(1) Supreme Court, U.S.

No. 99-99 308 AUG 19 1999

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In The

Supreme Court of the United States

DENA' NENA' HENASH a/k/a
TANANA CHIEFS CONFERENCE,

Petitioner,

vs.

CATHERINE N. IPALOOK and
The STATE OF ALASKA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the U.S. Constitution allow the award of punitive damages against a defendant after an affirmative finding that the defendant exercised good faith?

2) Do the factors to be considered in awarding punitive damages enunciated in *BMW of North America v. Gore,* 134 L.Ed.2d 809 (1996) apply to statutorily mandated civil penalties in a private civil litigation?

3) Does the U.S. Constitution require a Court to consider the factors enunciated in *BMW of North America v. Gore,* 134 L.Ed.2d 809 (1996) in considering statutorily mandated punitive damages in a civil case?

4) Does the Constitutionality of double liquidated damages in the Fair Labor Standards Act decided in *Overnight Motor Transp. Co., Inc. v. Missel,* 316 U.S. 572 (1942) depend upon the non-punitive nature of the award?

LIST OF PARTIES

Petitioner:

Dena' Nena' Henash a/k/a Tanana Chiefs Conference, Inc.

Respondents:

Catherine N. Ipalook

State of Alaska, Department of Labor, Wage and Hour Administration

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PETITION FOR A WRIT OF CERTIORARI

Dena' Nena' Henash a/k/a Tanana Chiefs Conference, Inc. respectfully petitions for a Writ of Certiorari to review the decision of the Alaska Supreme Court in this case.

OPINIONS AND ORDERS BELOW

The Alaska Supreme Court opinion is reported at *Dena' Nena' Henash v. Ipalook,* 1999 WL 318859 (Alaska) (reprinted in Appendix at App.-1). The Alaska Superior Court Findings of Fact and Conclusions of Law are unpublished (reprinted in Appendix at App.-24). The Alaska Superior Court's Judgement is unpublished (reprinted in Appendix at App.-48).

JURISDICTION

On May 21, 1999, the Alaska Supreme Court issued an opinion affirming the Superior Court's Findings of Fact and Conclusions of Law. The jurisdiction of this Court is invoked under 28 USC § 1257. Notifications under S.Ct. Rule 29.4(c) are not applicable since the State of Alaska is a party to this case.

STATUTE TO BE CONSTRUED

AS 23.10.110. Remedies of employee. [Pre-1995]

(a) An employer who violates a provision of AS 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages.

(b) An action to recover from the employer the wages and damages for which the employer is liable may be maintained in a competent court by an employee personally and for other employees similarly situated, or an employee may individually designate in writing an agent or representative to maintain an action for the employee. The consent shall be filed in the court in which the action is brought. At the request of a person paid less than the amount to which the person is entitled under AS 23.10.050-23.10.150, the commissioner may take an assignment in trust for the employee of the full amount to which the employee is entitled under this section and may bring any legal action necessary to collect the claim.

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action.

STATEMENT OF THE CASE

The Petitioner, Dena' Nena' Henash a/k/a Tanana Chiefs Conference, Inc. (hereinafter referred to as Tanana Chiefs) is a consortium of 42 Alaska Native tribal governments located in Interior Alaska, which provides health services formally operated by the Indian Health Service to Alaska Native people in Interior Alaska under the terms of the Indian Self-Determination Act (25 USC §§ 450 et seq.).[1] As part of this program, Tanana Chiefs operates a patient hostel, which provides lodging for Native patients traveling into Fairbanks for out-patient care at a regional clinic and hospital.

After her tenure as President of Tanana Chiefs, Ms. Ipalook was hired to manage the patient hostel. Historically, the manager position was classified as a supervisor position, exempt from overtime pay requirements. This was the case during Ipalook's tenure as President of Tanana Chiefs. As the patient hostel manager, she lived on the premises, worked a daily eight hour shift, supervised two other positions (a week end/relief manager

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[1] As a tribal consortium, Tanana Chiefs Conference could have asserted a defense of sovereign immunity in this case. *In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 658 N.E. 2d 989, 636 N.Y.S. 2d 116 (N.Y. Ct. App., 1995). *See also Gayle v. Little Six, Inc.*, 555 N. W. 2d 284, 293 (Minn. 1996); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 671 (8th Cir., 1986); *United States v. Turtle Mountain Housing Authority*, 816 F.2d 1273, 1276 (8th Cir. 1987) However, Tanana Chiefs had previously adopted a policy to not assert tribal immunities prior to this case being filed. After judgment was entered in this case, Tanana Chiefs' Board rescinded that policy.

and housekeepers) and was on call between 5:00 pm Sunday and 5:00 pm Friday weekly. She was paid a salary of $23,000 in addition to having her housing provided.

After the first few months as patient hostel manager, problems emerged between Ms. Ipalook and her supervisor, Ms. Bessie Williams. Essentially, Ms. Ipalook believed that her supervisor was undermining her status as a supervisor over the patient hostel. Ipalook initiated an extended grievance process to delineate her status as a supervisor. Ultimately, Tanana Chiefs upheld the grievance, reprimanded Ms. Williams for undermining Ipalook's supervisor status, and clarified both employee's duties. Tanana Chiefs refused to fire Ms. Williams and Ms. Ipalook resigned.

Shortly after her resignation, Ms. Ipalook filed a wage and hour lawsuit against Tanana Chiefs, claiming that she was never a supervisor and was entitled to overtime for 16 hours a day during the fourteen (14) months of her employment as patient hostel manager.[2] The trial court found that Tanana Chiefs had classified Ipalook as a supervisor exempt from overtime in good faith. However, the Court held that Ipalook did not actually exercise supervisory authority during her employment because of the unauthorized actions of Ms. Williams. Consequently, the Court awarded Ms. Ipalook

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[2] Originally, the Alaska Department of Labor was not a party to the lawsuit. ADL intervened during the appeal upon notice that Tanana Chiefs challenged the validity of the State statute. ADL was a party to the appeal before the Alaska Supreme Court.

$77,412.02 in compensatory damages for unpaid overtime wages.

Alaska has a unique wage and hour law, which differs from federal Fair Labor Standards Act in many important ways.[3] Most importantly to this appeal is the fact that Alaska law provided for a mandatory punitive damage[4] award equal to the amount of compensatory

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[3] For a general discussion of the differences between Alaska Wage and Hour Act and the FSLA. *See Bechtel Petroleum Inc. v. Webster*, 636 F. Supp. 486 (N.D. Cal. 1984).

[4] Alaska statutory language is somewhat misleading on this point. The relevant statute is facially similar to the FSLA. Alaska law and the FSLA both provide for "liquidated damages". Cf. AS 23.10.110 (1995) and 29 USC § 216. However, judicial interpretation of the Alaska statutory language markedly differs from the FSLA. Liquidated damages under the FSLA are not punitive. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 S.Ct. 1682, 62 L.Ed. 1216 (1942). Rather liquidated damages under the FSLA are compensation for damages suffered by a worker, in addition to the lost wages, which are too obscure and difficult to prove, such as interest. *Id.* Consequently, pre-judgment interest is not award under the FSLA, because liquidated damages are intended to compensate for delay in payment. *See also Brooklyn Savings Bank v. O'Neil*, 324 U.S 697, 745, 89 L.Ed. 1297, 1324, 65 S.Ct. 895 (1942).

In contrast, however, the Alaska Supreme Court has held that 'liquidated damages' under AS 23.10.110, are *punitive*. *Gore v. Schlumberger Ltd.*, 703 P.2d 1165, 1165-1166, (Alaska, 1985) (stating that liquidated damages in the AWHA are "a type of punitive damages, not . . . a substitute for compensatory damages"). *See also Alaska Int'l Indus. Inc. v. Musarra*, 602 P.2d 1240 (Alaska, 1979); *McKeown v. Kinney Shoe Corp.*, 820 P.2d 1068 (Alaska, 1991). As a consequence, pre-judgment interest may be awarded in addition to the punitive damages. *Bobich v. Stewart*, 843 P.2d 1232, 1236-1237 (Alaska, 1992). The practical effect of this distinction can be easily demonstrated in the present case.

damages, plus full attorney fees and pre-judgment interest.

Upon the trial court's oral announcement of its intention to award punitive damages, Tanana Chiefs requested and was granted leave to seek reconsideration of the award of punitive damages. Upon reconsideration, Tanana Chiefs first raised the question of the validity of the State statute mandating civil penalties as applied in this case. (Reprinted in Appendix at App.-51)

In this case, the Court awarded another $173,846.46 in punitive damages, attorney fees and pre-judgment interest for a total judgment of $251,258.48, or slightly less than 11 times Ms. Ipalook's annual salary.[5]

Under the FSLA, the total award would have been $218,508 (twice the compensatory award of $109,254) if Tanana Chiefs had not been successful in demonstrating its good faith. Under Alaska's statute, the award was $337,000 (three times the compensatory award).

However, under the FSLA, the award of liquidated damages is discretionary; subject to a "good faith employer" defense. *See* 29 USC 259. Under the Alaska statute in effect at the time of this case, Alaska did not provide for a "good faith employer" defense to punitive damages. *Alaska Int'l Indus. Inc. v. Musarra, supra; McKeown v. Kinney Shoe Corp., supra.* Since that time, the Alaska legislature has amended its statutes to allow a 'good faith employer' defense to the punitive damage award. *See* AS 23.10.110 (1995). This distinction greatly increases the distance between the FSLA and the Alaska statute in the context of this case. As a good faith employer, the judgment against Tanana Chiefs would only have been $109,254. Under the Alaska statute, it was over three times this amount.

[5] In this case, multiple penalties compounded the punitive impact of the punitive damages. In addition to the double damages provision, the Court afforded full attorney fees

In making the award, the trial judge included in the Findings of Fact and Conclusions of law that

> 24. If the court had discretionary authority whether or not to award liquidated damages, the court would not award liquidated damages against TCC.
>
> 25. TCC acted in good faith, based upon TCC's corporate course of conduct since the inception of the position of PHM; based upon the grievance filed by Ipalook as PHM; and based upon TCC's PCNs for the position of PHM.

Thus, notwithstanding the Court's finding that Tanana Chiefs exercised good faith in classifying Ms. Ipalook as exempt from overtime, the Court was compelled to award punitive damages against Tanana Chiefs.

In is opinion of May 21, 1999, the Alaska Supreme Court affirmed the trial Court ruling that mandatory punitive damages do not violate the substantive or procedural due process guarantees of the United States Constitution. In so doing, the Alaska Supreme Court ignored, and impliedly rejected, consideration of factors laid out by this Court in *BMW of North America v. Gore*, 516 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). (Constitution requires consideration of reprehensibility of defendant's conduct, ratio of award to actual harm done plaintiff, and

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because Tanana Chiefs Conference refused a settlement offer from Ipalook of $90,000, despite the fact that awarded compensatory damages were only $77,412.02. Additionally, the Court applied a penal interest rate of 15.5% for similarly failing to accept that offer.

sanctions imposed by state on comparable conduct in awarding punitive damages).

Moreover, the appellate court held that the trial court erred in calculating Ipalook's wages, and remanded the matter with directions to recalculate the award. Under the guidelines directed by the Alaska Supreme Court, compensatory damages would be approximately $109,254. Penalties, punitive interest and attorney fees increased the total judgment to slightly less than $337,000 or 14½ times Ms. Ipalook's annual salary. The amount is 168 times the *maximum* fine the State may impose on an employer for failing to pay overtime.[6] This penalty was assessed after the Court affirmatively found both TCC and Ipalook believed, in good faith, that she was a supervisor exempt from overtime requirements.

REASONS FOR GRANTING THE WRIT

A. Summary

This case presents an important question respecting the constitutionality of imposing mandatory civil penalties in private (non-governmental) civil litigation without consideration to recognized due process concerns applicable to punitive damage awards in private civil litigation.

The Court should grant review of the Alaska Supreme Court's decision because it squarely conflicts

[6] See AS 23.10.140 [providing for a maximum fine of $2,000 for failure to pay overtime].

with the holding of the California Supreme Court on the same important constitutional issue. Without granting review in this case, these important constitutional issues are likely to evade review because only a minority of the nation's jurisdictions allow, as a matter of substantive law, civil penalties in such situations as present in this case. In those jurisdictions that allow such penalties, they often apply in cases involving small amounts of money, which do not justify the costs of bringing the matter to this Court's attention. Moreover, legislatures often reform such statutes, when confronted by the inherent unfairness of applying penalties in the absence of reprehensible conduct. As a result, this case presents a unique opportunity for this Court to clarify these constitutional concerns, which may otherwise evade review.

Secondly, there are basically three contexts in which the law seeks to punish and deter behavior: 1) criminal and civil fines and penalties enforceable by the government; 2) punitive damages in private civil litigation; and 3) statutory civil penalties enforced in private civil litigation. The Court has clearly defined the Constitutional parameters surrounding the first two contexts. But privately enforced civil penalties are imposed in a constitutional vacuum. The closest caselaw available seems to be this Court's recent guidance respecting punitive damages in private civil litigation. That guidance would suggest a need to consider three important factors ignored in this case, including the presence of reprehensible conduct by the defendant. The only cases considered by this Court in the past dealing with civil penalties enforced in private litigation have presented cases where penalties are imposed in the context of a defendant's reprehensible

conduct. Left uncertain is the class of cases where a penalty is imposed in the clear absence of reprehensible conduct. It is therefore uncertain whether a State legislature can mandate the judges to do that, which if done by a jury, would be constitutionally offensive.

Finally, this Court has upheld double damage awards as liquidated damages for the failure to pay overtime, but only where the statute sought to compensate the employee for damages that were otherwise difficult to determine. That precedence has no application to statutes intended to punish, such as the one present in this case. The obvious implication, in need of clarification, is that such penalty statutes are constitutionally suspect.

For these reasons, this Court should grant review of the Alaska Supreme Court's decision in this case.

B. Reasons

1. The Holding Of The Alaska Supreme Court On The Constitutionality Of Imposing Statutorily Mandated Punitive Damages In The Absence Of Reprehensible Conduct Conflicts With The Decision Of The California Supreme Court, And The Question May Evade Review Because The Majority Of States Have Substantive Law Doctrines Disfavoring Such Penalties.

The California Supreme Court's holding in *Hale v. Morgan*, 22 Cal. 3d 388, 149 Cal. Rpt. 375, 584 P.2d 512 (1978)[7] clearly conflicts with the holding of the Alaska

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[7] It should be noted that the decision in *Hale* was made prior to this Court's holding in *BMW of North America v. Gore*, 516 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

Supreme Court in this case. One of the few cases dealing with the constitutionality of mandated punitive damages,[8] the Court in *Hale* held that the award of $17,300 in civil penalties against a landlord, mandated by the California landlord/tenant statute, violated the constitutional strictures providing due process. Noting that "(i)mposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy . . . ", 149 Cal. Rptr., at 381. The Court observed that "we have looked with disfavor on ever-mounting penalties and have narrowly construed the statutes which either require or permit them." *Id.*, at 383. It is important to note that the Court held that the statute was not unconstitutional *per se;* rather its application to a good faith landlord was offensive.

An additional concern for the California Court was the cumulative effect of punitive damages that compound the penalties to disproportionate levels. This is similar to what happened in this case. After making adjustment to the judgment ordered by the Court, the compensatory damages in this case are $109,254. If a simple double damages award were entered the award would have been $218,308. But the addition of a penal pre-judgment interest rate of 15.5% and attorney fees, trebled of the judgment to over $337,000.

There is little doubt that the Alaska and California Supreme Courts differ upon the Constitutionality of these

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[8] The constitutionality of such statutes was briefed and argued in *Woods v. Littleton,* 554 S. W. 2d 662, 671 (Tex., 1977), but, the Court rather unhelpfully concluded that the constitutional concerns were "dubious".

statutes' application. Alaska holds that statutory mandatory punitive damages do not raise constitutional concerns. California holds the opposite. If this Court does not grant review in this case, this split between State courts of last resort is likely to evade review by this Court.

Mandatory civil penalties have been a part of American jurisprudence since the early days of our republic.[9] However, it has been largely assumed that the trigger for multiple damage awards has been bad faith, willfulness, or other reprehensible conduct. As noted by Justice Marshall,

> (A) forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed.

Peisch v. Ware, 4 Cranch 347, 363, 2 L.Ed. 643 (1808). The concept is rooted in the maxim of English common law that "to constitute any crime, there must be a 'vicious will' ". BLACKSTONE, COMMENTARIES, 21.

In most states, statutes imposing civil penalties require a showing of bad faith, willfulness or other reprehensible conduct as a condition for imposing such

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[9] As noted by Justice Field in 1885,

> The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble and even quadruple the actual damages.

Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 523, 29 L.Ed. 463, 6 S.Ct. 110 (1885).

penalties. This is done either in the text of the statute[10] or by judicial interpretation.[11] As a general matter, mandatory penalties are disfavored as a matter of state substantive law.[12] A minority of jurisdictions allows mandatory civil punitive penalties in the strict liability context as a matter of substantive state law.[13] The majority of Courts, however, follow the common law principle that holds,

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[10] *Sears, Roebuck & Co. v. Big Bend Motor Inn*, 818 S. W. 2d 542 (Tex. App. Ft. Worth, 1991) [treble damages discretionary in consumer protection statute]; *Collier v. Roth*, 468 S. W. 2d 57 (Mo. App. 1971) [treble damages discretionary for violation of Unfair Milk Sales Act]; *Midland Risk Ins. Co. v. State Farm Mut. Auto Ins.*, 643 So. 2d 242 (La App., 1994) [statutory civil penalties payable upon showing of breach of good faith under insurance consumer statute]; *Kwan v. Mercedes-Benz of North Am.*, 23 Cal. App. 4th 174, 28 Cal. Rptr. 2d 371 (Cal. App. 1994) [double damages for willful violation of Consumer Warranty Act violation];

[11] *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546 (Miss., 1962) [Implied good faith defense to statutory civil penalty for wrongful cutting of trees]; *Cooper v. Jeter*, 17 N. J. Super. 180, 85 A. 2d 555 (N. J. 1951) [Implied good faith defense to treble damage statute for violation of landlord/tenant laws]; *East India Trading Co. v. Dada Haji Ebrahim Halari*, 305 N.Y. 866, 114 N.E.2d 213 (N.Y., 1953) [Implied good faith defense to mandatory penalty set in arbitration rules set aside].

[12] *See* 70 C.J.S. Penalties Sec. 2 (1987).

[13] *See Ragsdale v. Progressive Voters League*, 790 S. W. 2d 77 (Tex. App., 1990) [double damages in election statute mandatory]; *State, Dept. of Environmental Protection v. Lewis*, 215 N. J. Super. 564, 522 A. 2d 485 (N. J. Super. 1987) [approving mandatory civil punitive penalty in contrast to punitive damages]. *Compare Cooper v. Jeter, supra*, n7.

> When an act has been done in good faith, even though it may result injury to plaintiff, in general, there cannot be recovery of punitive damages.

Walker v. Brown, 501 So. 2d 358, 552 (Miss., 1987). Clearly, Alaska's substantive law differs on this point. As a result, the constitutionality of such laws only arise in a minority of the nation's jurisdictions.

Such statutes, once passed, seem to evoke subsequent outrage, which compel their amendment.[14] Such is the case here, where the Alaska Legislature has amended the offending statute to insert a "good faith" exception to mandatory punitive damages. *See* Sec. 4, ch 37, SLA 1995 [AS 23.10.110. (1995)].[15] Such self-correcting efforts, however, offer little solace for Tanana Chiefs, and similarly situated defendants who, however occasionally, are subjected to large excessive penalties. Not withstanding their effort to be a responsible employer and good corporate citizen, Tanana Chiefs suffers excessive penalties because of the wooden rules enacted by a well-meaning legislature, which have the unintended effect of an arbitrary and irrational application. In these cases, the good employer is punished in the same manner as the bad, which undermines the deterrent goals of the legislature.

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[14] For example, in Texas, a decision by the Supreme Court to uphold statutory mandated punitive damages in a consumer protection context resulted in State legislative amendment to change such damages to discretionary. *See Sears, Roebuck & Co. v. Big Bend Motor Inn*, 818 S. W. 2d 542 (Tex. App. Ft. Worth, 1991).

[15] Indeed the Fair Labor Standards Act was similarly amended. *See* 29 USC § 259.

Finally, such statutes usually involve substantially smaller amounts than presented by the instant case. As noted above, such statutes are most often found in consumer protection, landlord/tenant, and health and safety legislation. As a result, the constitutional issues raised by such statutes arise occasionally; where excessive penalties are imposed, as in the present case.

Review by this Court, while offering relief to Tanana Chiefs, would offer needed guidance respecting the Constitutional parameters of such statutes. This Court should grant review.

2. The Question Whether The Considerations Articulated In *BMW v. Gore* Apply To Civil Penalties Awarded In Private Causes Of Action Is An Important Question In Need Of Resolution By This Court.

In *BMW of North America v. Gore*, 516 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), this Court enunciated the elementary notions of fairness enshrined in our constitution which must be considered in determining the reasonableness of punitive damages: 1) degree of reprehensibility, 2) ratio to actual harm inflicted on the plaintiff, and 3) sanctions for comparable misconduct. Neither the trial court nor the Alaska Supreme Court considered these factors in ordering punitive damages against the Tanana Chiefs. If they had, as stated by the trial judge, an award of punitive damages would have been inappropriate.

Imposition of punitive damages by a jury in the absence of reprehensible conduct by the defendant would

be constitutionally suspect under *BMW v. Gore, supra.* Equally, a punitive sanction of $109,000 is far in excess of the $2,000 maximum criminal sanction for violation of the Alaska overtime statutes. AS 23.10.140. And finally, when compared to the harm sustained by Ipalook, the ultimate award of over a third of a million dollars is vastly disproportionate to the actual loss sustained by Ipalook. Such an award of punitive damages under *BMW v. Gore* would be considered excessive and violative of due process. But the Alaska Supreme Court reasons that since the legislature established a wooden arbitrary double damage standard, the three *BMW v. Gore* factors are irrelevant. The Alaska Court's premise is remarkable. A jury's failure to consider the absence of reprehensible conduct and related factors is constitutionally offensive, while the same failure by the Legislature lacks serious constitutional concern.

Notwithstanding the absurd result, the failure of the Alaska Supreme Court to address the considerations articulated in *BMW v. Gore* reflects a general uncertainty respecting the status of civil penalties in the context of these constitutional concerns. Civil penalties arise in three contexts: 1) punitive damages, 2) civil fines and penalties enforced by the government, and 3) civil penalties sought in private causes of action. While this Court has resolved many of the constitutional questions surrounding the former two types of civil penalties, the latter remains largely uncertain.

For example, civil fines and penalties sought by the government are generally held to be subject to Seventh[16] (right to jury trial) and Eighth Amendments[17] (Excessive penalties) restrictions of the U.S. Constitution. In *Tull v. United States*, 481 U.S. 412, 422 n7, 95 L.Ed.2d 365, 376 n7 107 S.Ct. 1831 (1987) the Court suggested that there may be no significant distinction between civil penalties and punitive damages, however, in *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 106 L.Ed.2d 219, 109 S.Ct. 2909 (1989) this Court held that punitive damages were not limited by the Eighth Amendment considerations. An example of this confusion can be seen in *Department of Environmental Protection v. Lewis*, 215 N.J. Super. 564, 522 A. 2d 485 (1987), (civil mandatory penalties approved in government enforcement action) which distinguished statutory civil penalties and punitive damages without distinction between government enforced penalties and penalties arising in private enforcement actions.

Decisions of this Court respecting punitive damages have rested upon the assumption that punitive damages are not available in the absence of reprehensible conduct (e.g. evil motive, recklessness, or indifference to protected rights).[18] For example, in *Overnight Motor Transp.*

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[16] *Tull v. United States*, 481 U.S. 412, 95 L.Ed.2d 365, 107 S.Ct. 1831 (1987).

[17] *Ex Parte Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908).

[18] *Smith v. Wade*, 461 U.S. 30, 52, 75 L.Ed.2d 632, 648-649, 103 S.Ct. 1625 (1983); *See also, Memphis Community School District v. Stachura*, 477 U.S. 299, 91 L.Ed.2d 249, 106 S.Ct. 2537 (1986) noting that "Purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior."

Co., Inc. v. Missel, 316 U.S. 572, 691, 62 S.Ct. 1216, 86 L.Ed. 1682, 1691 (1942), this Court noted that, "Even double damages treated as penalties have been upheld as within constitutional power." *Citing Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 29 L.Ed. 463, 6 S.Ct. 110 (1885). But in the *Humes* and other cited cases, this Court only confronted penalty statutes that were triggered by reprehensible conduct. As this Court noted

> Perhaps (these cases should) be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment.

Missouri Pacific R. Co. v. Humes, 115 U.S. at, 521, 29 L.Ed. at, 466. In other words, they arise under statutes that incorporate a finding of reprehensible conduct as an element of initial liability. Consequently, they do not conflict with *BMW v. Gore*. The question left unanswered by the *Humes* line of cases (especially in light of *BMW v. Gore*) is whether civil penalties can be imposed in a private cause of action under circumstances that punitive damages would be constitutionally offensive? This important issue is squarely presented by this case and deserves review and clarification by this Court.[19]

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[19] All of these questions beg a more important constitutional question which this Court must answer at some time in the near future: If civil penalties are not equivalent to punitive damages, and thereby subject to the due process limitations articulated by this Court in *BMW v. Gore*, do the Seventh and Eighth Amendment protections applicable in government prosecutions for civil penalties apply? This case presents the first question in the quest for that answer.

3. The Holding Of The Alaska Supreme Court On The Constitutionality Of Mandatory Civil Penalties Conflicts With The Implied Holding Of This Court In *Overnight Motor Transp. Co. v. Missel.*

In *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942), this Court upheld mandatory liquidated damages equal to double compensatory damages under the former provisions of the Fair Labor Standards Act. However, the premise of that decision was that the damages were "compensation, not a penalty or punishment by the Government." 316 U.S., at 583-584, 62 L.Ed. 1690-1691. The Court went on to note that, "the retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Id.* In this case, Ipalook is not merely compensated for consequential damages difficult to determine. Ipalook obtains a windfall.

As noted above, the Alaska law differs substantially from such a characterization. Under Alaska law, the double damage award is a penalty and punishment by the government. *Gore v. Schlumberger Ltd.*, 703 P.2d 1165, 1165-1166 (Alaska, 1985), and cannot be supported upon the same logic used by this Court in *Missel*. Of course the obvious implication is that civil penalty statutes applied to good faith defendants are constitutionally suspect.

As noted by the Alaska Supreme Court in the present case, it is obvious that such penalties derive from the police powers of the state. In an ordered Constitutional democracy, such an observation is merely the first inquiry

in determining the limits of that power. Such an observation merely begs the more important issue: Does the fact that such penalties derive from the police powers of the state mean that the Government has unfettered discretion to penalize its citizens of good faith with the whim of a 14th Century monarch? The application of the Alaska statute in this case squarely presents this issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 19, 1999

THE SUPREME COURT OF THE STATE OF ALASKA

DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC., Appellant and Cross-Appellee, v. CATHERINE N. IPALOOK, Appellee and Cross-Appellant.	Supreme Court Nos. S-8248/8268 Superior Court No. 4FA-95-2745 CI OPINION [No. 5119 – May 21, 1999]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Michael J. Walleri, Tanana Chiefs Conference, Inc., Fairbanks, for Appellant and Cross-Appellee. James M. Hackett, Law Offices of James M. Hackett, Inc., Fairbanks, for Appellee and Cross-Appellant. Toby N. Steinberger, Assistant Attorney General, Anchorage, Bruce M. Botelho, Attorney General, Juneau, for Amicus Curiae State of Alaska.

Before: Matthews, Chief Justice, Compton, Eastaugh, Fabe, and Bryner, Justices.

MATTHEWS, Chief Justice.

I. INTRODUCTION

Catherine Ipalook filed a claim for unpaid overtime and liquidated damages pursuant to the Alaska Wage and

Hour Act (AWHA) against her former employer, Tanana Chiefs Conference, Inc. (TCC). She alleged that her position as Patient Hostel Manager (PHM) was improperly classified as exempt from overtime. TCC counterclaimed for a complete offset of any damages, alleging that Ipalook had breached her fiduciary duty to TCC during her prior tenure as president.

Following a bench trial, the court held that Ipalook's position was not exempt from overtime payment and held that she had not breached her fiduciary duty. It awarded Ipalook $77,412.02 in unpaid overtime, an equal amount in liquidated damages, prejudgment interest from the date of the complaint, attorney's fees, and costs. TCC appeals the finding that Ipalook did not breach her fiduciary duty and also appeals the award of liquidated damages. Ipalook cross-appeals from the amount of the overtime pay award and from the prejudgment interest award. We affirm the judgment in favor of Ipalook but reverse the damages award.

II. FACTS AND PROCEEDINGS

Catherine Ipalook served as the president of TCC from March 1990 until March 1991. During her tenure as president, TCC operated a Patient Hostel in Fairbanks.[1] TCC classified the PHM position as exempt from overtime compensation under the AWHA both before and during Ipalook's tenure as president.

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[1] The Patient Hostel provides lodging for patients who are traveling into Fairbanks from outlying villages to receive medical care.

On June 19, 1994, TCC hired Ipalook as the PHM. While Ipalook was in this position, TCC continued to treat the PHM position as exempt. TCC paid Ipalook a salary of $1,916.65 per month and provided her an apartment on the premises of the hostel. As PHM, Ipalook worked at the hostel during the day, but was also on-call twenty-four hours a day from 5:00 p.m. on Sunday until 5:00 p.m. on Friday.

A few months after she was hired as PHM, Ipalook filed a grievance, complaining that she was not accorded proper status as supervisor over the hostel. TCC agreed with Ipalook, but her immediate supervisor continued to deny Ipalook actual supervisory status.

Ipalook resigned from the PHM position on August 18, 1995. On November 21 she filed a wage claim under the AWHA, arguing that she was never actually a supervisor, and was therefore not exempt from overtime compensation. She alleged that she should have been paid overtime for the twenty-four hours per day that she was on-call.

TCC argued that the position was properly classified as exempt since Ipalook was a supervisory or executive employee. It also raised two breach of fiduciary duty counterclaims. Ipalook then filed a third-party complaint against the current president and the current personnel officer of TCC, seeking indemnification from them if she was found liable on either of TCC's counterclaims.

The case was tried to the superior court. The court held that Ipalook was supposed to have been a supervisor, but was never actually given supervisory authority, even after the grievance process. It thus held that

Ipalook's position was not exempt from overtime compensation. The court further held that Ipalook had not breached her fiduciary duty to TCC, and that even if she had, her breach was not the legal cause of TCC's liability for overtime compensation.

The court held that Ipalook was entitled to $77,412.02 in overtime pay and an equal amount in mandatory liquidated damages. It calculated the award of overtime based solely on Ipalook's hourly rate, instead of using the parties' stipulated rate, which combined her hourly rate with the value of the employer-provided apartment. In addition, it awarded prejudgment interest from the date Ipalook filed her complaint instead of from each pay period for which overtime was owed.

TCC appeals from the superior court's findings that Ipalook did not breach her fiduciary duty and from the award of liquidated damages. However, it does *not* appeal the court's finding that Ipalook was a non-exempt employee or the amount of the overtime awarded to Ipalook. Ipalook cross-appeals from the amount of the overtime award and from the amount of the prejudgment interest award.

III. DISCUSSION

A. The Superior Court's Findings that Ipalook Did Not Breach Her Fiduciary Duty Were Not Clearly Erroneous.[2]

TCC raised two breach of fiduciary duty counterclaims against Ipalook to offset any damages the court awarded to her. First, it claimed that Ipalook breached her fiduciary duty while president of TCC by failing to correctly classify the PHM position. Second, it claimed that Ipalook breached her continuing fiduciary duty by failing to disclose to TCC, prior to filing her lawsuit, that the PHM position was erroneously classified.

The superior court held that TCC's counterclaims against Ipalook were not viable because Ipalook did not breach her fiduciary duty to TCC, and even if she had, her breach did not cause TCC's liability because the actions of the current TCC president, Will Mayo, were subsequent superceding events. TCC argues that the court's findings that Ipalook was not liable for breaching her fiduciary duty were not supported by the evidence.

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[2] When a case is tried to the superior court, we will only review the court's factual findings to determine if they are clearly erroneous. *See State v. Phillips*, 470 P.2d 266, 268 (Alaska 1970); *see also* Alaska R. Civ. P. 52(a); *Fairbanks Fire Fighters Ass'n. Local 1324 v. City of Fairbanks*, 934 P.2d 759 (Alaska 1997). A finding is not clearly erroneous unless, from a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *See Phillips*, 470 P.2d at 268. We have emphasized that the trial judge, who has seen and heard the testimony, is in a better position than an appellate court to judge the credibility of witnesses and determine the weight to attach to their testimony. *See id.*

The first issue is whether the superior court's finding that Ipalook did not breach her fiduciary duty while president was clearly erroneous. "A corporate officer or director stands in a fiduciary relationship to his corporation. Out of this relationship arises the duty of *reasonably protecting* the interests of the corporation."[3] A fiduciary relationship requires the person "to act in good faith and with due regard to the interests of the one imposing the confidence."[4]

Here, the superior court found that Ipalook relied on her department heads in personnel matters, as authorized by TCC's own personnel policies. It also found that the course of conduct of both Ipalook and Mayo was to respond to a problem when it came to their attention. Furthermore, it found that during Ipalook's term, no problem regarding overtime or wage and hour matters came to her attention as president.

We hold that these findings would allow the superior court to find that Ipalook did not breach her duties while president, because she reasonably delegated personnel matters, but would have dealt with any personnel issues that came to her attention. These actions would be sufficient to "reasonably protect[] the interests of the corporation."[5]

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[3] *Alvest, Inc. v. Superior Oil Corp.*, 398 P.2d 213, 215 (Alaska 1965) (emphasis added).

[4] *Paskvan v. Mesich*, 455 P.2d 229, 232 (Alaska 1969) (footnote omitted).

[5] *Alvest*, 398 P.2d at 215.

We also hold that the superior court's factual findings were not clearly erroneous. Ipalook admitted at trial that while in office, she did not take any affirmative action to insure that TCC complied with the AWHA, and never investigated any written job description or classification, including the classification of the PHM position. However, Ipalook also testified that she delegated responsibility for personnel matters to her department heads and to the personnel officer. She specifically stated that updating job descriptions was the responsibility of the personnel officer. She also testified that she would examine a personnel matter if it came to her attention, and would refer it to legal counsel if necessary. However, no wage and hour problems had confronted her while president.

This testimony was supported by the testimony of the current personnel officer, who testified that it was her responsibility to properly classify positions. She also testified that re-classification had historically been done by the personnel officer, and that personnel matters were usually delegated by the president.

Further, the current president stated that the decision of whether a position was exempt or non-exempt would be determined when the position was first created, and that the president would be involved in that decision. He also testified that when the PHM position was first created in the mid-1980s, it was recognized as exempt and has retained that classification from that time. In addition, he testified that he did not investigate the PHM's classification; instead, he relied on his personnel officer to ensure that the position was properly classified.

This testimony demonstrates that it was reasonable for Ipalook to rely on the original classification of the PHM position, because the position opened before Ipalook's tenure as president. Since the classification had already been determined and since she had properly delegated personnel matters to her personnel officers and department heads, her failure to investigate when there was not a specific problem was not a breach of fiduciary duty.

The second issue is whether the superior court's finding that Ipalook did not breach her continuing fiduciary duty by failing to disclose TCC's liability until she filed her lawsuit was clearly erroneous. This claim is similar to a claim of fraud by non-disclosure, which is one type of breach of fiduciary duty.[6] " 'Fraud can be established by silence or non-disclosure when a fiduciary relationship exists between parties. . . . The fiduciary has a duty to fully disclose information which might affect the other person's rights and influence his action.' "[7] Even if Ipalook had a continuing fiduciary duty to disclose this type of information, TCC would still have to prove that Ipalook "had knowledge of material facts which [she] failed to disclose to [TCC], and that [TCC] would have acted differently had it known such facts, thereby avoiding damages."[8]

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[6] *See Ben Lomand, Inc. v. Schwartz*, 915 P.2d 632, 634 (Alaska 1996).

[7] *Id.* (quoting *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988) (citations omitted)).

[8] *Id.* at 635-36 (citing *Carter*, 755 P.2d at 1086).

The superior court found that Ipalook, while president, did not fail to disclose any information about the non-exempt status of the PHM position, because she did not have specific knowledge of the matter at the time. The court also found that Ipalook did not breach any continuing fiduciary duty, because the position was historically treated as exempt, and the issue of whether it was properly classified only came to Ipalook's attention after her employment as PHM had ended.

These findings are supported by the evidence. Ipalook testified that she did not know that the position was non-exempt until she spoke with her attorney after she had resigned as PHM. TCC failed to present any contrary evidence to show that Ipalook knew that the position was improperly classified before that time. Therefore, Ipalook did not fail to disclose information that could have relieved TCC of liability. We thus hold that the superior court's finding that Ipalook did not breach her continuing fiduciary duty was not clearly erroneous.[9]

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[9] Since we hold that the superior court's finding that Ipalook did not breach her fiduciary duty to TCC was not clearly erroneous, we do not reach the causation issue.

B. The Mandatory Award of Liquidated Damages under the Alaska Wage and Hour Act Is Constitutional.[10]

The trial court held that former AS 23.10.110(a), which was in force until August 22, 1995, applied to this case.[11] It thus held that Ipalook was entitled to $77,412.02 in mandatory liquidated damages. TCC argues that this award violates its federal substantive and procedural due process rights and its state equal protection rights.

1. The mandatory award of liquidated damages does not violate the substantive or procedural due process guarantees of the United States Constitution.

TCC argues that former AS 23.10.110 violates the substantive due process guarantees of the United States Constitution.

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[10] Constitutional issues are questions of law to which this court applies its independent judgment. *See Chiropractors for Justice v. State*, 895 P.2d 962, 966 (Alaska 1995).

[11] Former AS 23.10.110 provides that an employer who fails to pay overtime compensation is liable for liquidated damages in an amount equal to the amount of unpaid overtime compensation. The award of liquidated damages in this provision is mandatory. *See Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1249 (Alaska 1979). The current version of AS 23.10.110 gives the court the discretion to refuse to award liquidated damages or to award an amount less than the amount of unpaid overtime compensation if it finds that the employer acted in good faith. However, this amendment only applies to "agreements entered into on or after August 22, 1995." Ch. 37, § 4, SLA 1995. Since Ipalook began as PHM on June 19, 1994, the new amendment does not apply to this cause of action.

The United States Supreme Court, though, has held that the former version of the liquidated damages provision in the Federal Labor Standards Act (FLSA), which mandated liquidated damages, is constitutional.[12] It stated:

> The liquidated damages for failure to pay the minimum wages under sections 6(a) and 7(a) are compensation, not a penalty or punishment by the Government. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. Nor can it be said that the exaction is violative of due process. It is not a threat of criminal proceedings or prohibitive fines, such as have been held beyond legislative power by the authorities cited by petitioner. Even double damages treated as penalties have been upheld as within constitutional power.[13]

TCC argues that this case is distinguishable because under the AWHA liquidated damages are a form of punitive damages.[14]

Providing for mandatory liquidated damages as a penalty is not arbitrary, and it serves important state policies by deterring and punishing violations of the AWHA. The stated policy behind the AWHA is to protect

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[12] *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942).

[13] *Id.* at 583-84 (citations and footnotes omitted).

[14] *See Gore v. Schlumberger Ltd.*, 703 P.2d 1165, 1165-66 (Alaska 1985) (stating that liquidated damages in the AWHA are "a type of punitive damages, not . . . a substitute for compensatory damages"); *see also Bobich v. Stewart*, 843 P.2d 1232, 1236-37 (Alaska 1992).

"the health, efficiency, and general well-being of workers.[15] We have emphasized that "the liquidated damages provision of AWHA is intended to further the policy behind the AWHA by punishing the violating employer."[16] The liquidated damages provision is also intended to deter violations of the act.[17] These policies are rational, and are reasonably served by the mandatory liquidated damages provision.

Further, this court has affirmed the award of mandatory liquidated damages pursuant to the AWHA in several cases.[18] Our strong support of mandatory liquidated damages under the AWHA in the past suggests that this court should not find this statute arbitrary or irrational.

The fact that we have labeled the liquidated damages provision as punitive in nature does not make the statute arbitrary. We thus hold, as the Supreme Court did in *Missel*,[19] that the mandatory award of liquidated damages does not violate due process.

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[15] *McKeown v. Kinney Shoe Corp.*, 820 P.2d 1068, 1070 (Alaska 1991) (quoting AS 23.10.050(2)).

[16] *Id.*

[17] *See id.*

[18] *See, e.g., Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240 (Alaska 1979) (holding that jury erred as a matter of law in failing to award liquidated damages in an amount equal to the overtime compensation award); *McKeown v. Kinney Shoe Corp.*, 820 P.2d 1068 (Alaska 1991) (holding that private settlements of liquidated damages claims under the AWHA are void as contrary to the strong policy behind the AWHA and its liquidated damages provisions).

[19] 316 U.S. 572 (1942).

TCC also argues that the liquidated damages award violates substantive due process because it is excessive. But a liquidated damage provision set by statute does not present the dangers of arbitrary and excessive awards that are inherent in jury awards. Here, the legislature has already determined a reasonable amount for liquidated damages.[20] Mandating a penalty equal to the unpaid overtime compensation is not so obviously unreasonable or so excessive that it violates substantive due process.

TCC also argues that the mandatory award violates procedural due process because this court does not review the award. TCC cites *Honda Motor Co. v. Oberg*[21] which holds that a state system which did not provide for judicial review of the amount of punitive damages violated procedural due process because appellate courts must ensure that jury awards of punitive damages do not result in arbitrary or irrational deprivations of property. But the danger of arbitrary or irrational awards does not exist where the formula for liquidated damages is statutorily prescribed.[22] We thus reject both of these arguments.

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[20] *See United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) ("A statutorily prescribed penalty violates due process rights 'only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' ") (citation omitted).

[21] 512 U.S. 415 (1994).

[22] *See Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1165 (S.D. Ind. 1997) (refusing to apply the requirement of judicial review from *Oberg* to statutorily prescribed damage awards).

2. The mandatory award of liquidated damages does not violate the equal protection guarantee of the Alaska Constitution.[23]

TCC also argues that the provision violates the equal protection clause of the Alaska Constitution, because it irrationally distinguishes between good faith employers who violated the AWHA prior to the amendments and those who violated the act after the amendment, by punishing only the former with liquidated damages.

We rejected a similar argument in *Alyeska Pipeline Service Co. v. Anderson*.[24] In *Alyeska Pipeline*, we held that the 1980 amendment to AS 09.30.070, which raised the interest rate from 8% to 10.5%, and only applied to judgments entered after the effective date of the act, was not a violation of state or federal equal protection guarantees:

> *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505, 31 S. Ct. 490, 491, 55 L. Ed. 561, 563 (1911) ("[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time."); *Polelle v. Secretary of Health, Education & Welfare of the United States*,

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[23] Under the rational basis test for equal protection analysis, in order for a classification to survive judicial scrutiny, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *McConkey v. Hart*, 930 P.2d 402, 407-08 (Alaska 1996) (quoting *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976)).

[24] 669 P.2d 956, 957 (Alaska 1983).

> 386 F. Supp. 443, 444 n.4 (N.D. Ill. 1974) ("Plaintiff's argument that making this amendment non-retroactive denies equal protection borders on the frivolous."); *see also Application of Brewer*, 430 P.2d 150, 153 (Alaska 1967) ("To make . . . legislation prospective in operation only . . . satisfies constitutional requirements of equal protection so long as the law in operating prospectively does not invidiously discriminate between different classes of persons").[25]

Here, the legislature has changed its policy and now allows a good faith defense to the award of liquidated damages. It chose to apply this amendment prospectively to agreements entered into after August 22, 1995. However, the distinction created between employers who fail to pay overtime before and after the effective date is not discriminatory, and is based on a rational decision by the legislature. We thus reject TCC's equal protection argument.

C. The Superior Court Erred in Failing to Use the Parties' Pretrial Stipulation to Determine Ipalook's Overtime Compensation Rate.

Pursuant to the Civil Pretrial Order, the parties filed their written Pretrial Stipulation at the time of the pretrial conference. In relevant part, the stipulation provides:

> 4. that the state minimum wage, at all relevant times during employment of Plaintiff Cathi Ipalook as the Patient Hostel Manager with Defendant TCC, was $4.75 an hour;

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[25] *Id.*

> 5. that Plaintiff Cathi Ipalook's *straight time rate of compensation* as Patient Hostel Manager with Defendant TCC, at all times relevant, was $15.38 per hour, which rate includes the fair market value of the employer's provided apartment[.]

(Emphasis added.)

Ipalook argues on cross-appeal that the trial court erred in refusing to use the stipulated rate of $15.38 per hour as the "regular rate of pay" to calculate her overtime compensation rate. She argues that the stipulation was intended to be an issue stipulation – that the market value of the apartment should be included in the "regular rate of pay" – and a factual stipulation – that the combined hourly rate and value of the apartment was $15.38 per hour.[26]

TCC argues that the stipulation was only intended to demonstrate that Ipalook was paid two-and-a-half times the state minimum wage. It argues that interpreting the stipulation as Ipalook suggests would be beyond the intent of the parties and would be a stipulation of law that was not binding on the superior court.

The superior court accepted the factual stipulation in the agreement – that the value of Ipalook's hourly rate combined with the fair market value of the employer-

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[26] If the court had accepted the stipulation to fix Ipalook's regular rate of pay, it would have merely multiplied $15.38 times 1.5 to calculate Ipalook's overtime compensation rate. *See* AS 23.10.060(b) (providing that employers must pay overtime in the amount of one and one-half times the employee's "regular rate of pay").

provided apartment was $15.38 per hour. However, it did not accept the legal or issue stipulation – that the stipulation fixed the regular rate of pay to calculate Ipalook's overtime compensation rate. It stated that

> it is unfair to base Ipalook's regular rate on Ipalook's compensation of $11.05 per hour, plus the hourly equivalent of the fair value of the apartment provided, because Ipalook in fact received the apartment.
>
> Thus the court concludes that [the] regular rate for purposes of calculating the amount of Ipalook's unpaid overtime should be based upon $11.05 per hour, instead of being based upon a combination of $11.05 an hour, plus the hourly equivalent of the fair value of the apartment, or the amount of $15.38 an hour which includes the fair value of the apartment.
>
> Consequently the appropriate overtime rate, at time and a half, . . . is $16.58 an hour, instead of the figure of $23.08 an hour used by Ipalook's expert witness Ms. Jacqueline Briskey, CPA, (the higher amount of $23.08 an hour includes the hourly equivalent of the fair value of the apartment).

The first issue is whether the parties intended the stipulation to determine Ipalook's "regular rate of pay" to calculate her overtime compensation rate. This court discussed the construction of stipulations in *Godfrey v. Hemenway*,[27] stating:

> [T]he construction of stipulations is governed by the rules of contracts. The primary concern of

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[27] 617 P.2d 3, 8 (Alaska 1980).

> the courts is to determine the intent of the parties. The courts look with favor on stipulations designed to simplify, shorten or settle litigation, or to save costs and will not give such stipulations a forced construction. Thus, the "[l]anguage of a stipulation, whether it be an agreed statement of facts or relates to other matters, will not be so construed as to give it the effect of a waiver of a right not plainly intended to be relinquished."

(Citations omitted.)

TCC argues that the only purpose of the stipulation was to demonstrate that Ipalook was paid two-and-a-half times the minimum wage to support its argument at trial that she was an exempt executive employee. This argument is contrary to TCC's conduct in the trial, however. It never raised either of the legal issues which it now asserts (either that the apartment should not be included in the regular rate of pay because it was provided for the employer's convenience, or that the proper method of valuing the apartment was to determine its reasonable cost to TCC). It also never introduced any evidence to support these arguments or to contradict the stipulated rate.

Further, Ipalook's "regular rate of pay" was never an issue that was discussed by the parties prior to the court's finding that it would not apply the stipulation. Ipalook's expert calculated the market value of the apartment, which the parties used to enter their stipulation. Her expert then used the stipulated amount as the regular rate of pay to determine Ipalook's total unpaid overtime compensation. TCC never contradicted any of this

evidence. We thus hold that the parties intended the stipulation to determine completely Ipalook's "regular rate of pay" to calculate her overtime compensation rate.

The second issue is whether this stipulation was binding on the superior court. We have recognized a distinction between stipulations "which merely foreclose consideration of a legal issue," and those "which seek to resolve without judicial scrutiny a legal question."[28] We have given effect to a stipulation which foreclosed consideration of a legal issue, because issue stipulations save time and money for the litigants and for the court, and are often a negotiated compromise in the parties' legal positions.[29] "Sound judicial policy dictates that private settlements and stipulations between the parties are to be favored and should not be lightly set aside.[30]

However, " '(a)lthough the parties' efforts toward simplifying the issues in a case are always appreciated, stipulations as to the law are not binding upon the court.' "[31] Stipulations as to law "may have a profound impact on third

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[28] *City and Borough of Sitka v. Construction and Gen. Laborers Local 942*, 644 P.2d 227, 234 (Alaska 1982).

[29] *See id.* at 234-36; *see also Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 39 n.19 (Alaska 1980) (applying stipulation that plaintiffs would raise only four identified constitutional challenges to reject plaintiff's attempt to raise constitutional challenges on appeal not sanctioned by the stipulation).

[30] *Sitka*, 644 P.2d at 234 n.18 (quoting *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1031 (Alaska 1972)) (footnote omitted).

[31] *Id.* at 235 (quoting *Dresser Indus., Inc. v. Alaska Dep't of Labor*, 633 P.2d 998, 1004 (Alaska 1981)).

parties, the public, and the judicial process itself. Accordingly, we have refused to give effect to stipulations regarding a question of law which unduly interfere with vital interests of the public or which impermissibly impinge on judicial functions."[32]

In *Sitka*, we held that a stipulation, which provided that if the union prevailed the remedy would be damages paid to the workers, included a waiver of any legal issue which would defeat the award of damages.[33] We held that the stipulation only barred consideration of an issue, and was not a stipulation of a question of law, even though the issue barred was a legal question of general public importance.[34] We emphasized three factors: (1) resolving this case by referring to the parties' stipulation would not "taint the future consideration of that important issue"; (2) the impact on non-parties is inconsequential; and (3) the stipulation did not impermissibly invade the prerogatives of this court.[35]

The stipulation in this case is an issue stipulation, similar to the stipulation in *Sitka* – instead of an invalid

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[32] *Id.* (citations and footnote omitted); *see also Dresser Indus.*, 633 P.2d at 1004-06 (rejecting parties' stipulation which attempted to unduly restrict the judicial review of an administrative regulation, because of policy considerations implicated where stipulations impair a court's assessment of the validity of a regulation); *Harris v. Morris*, 531 P.2d 517, 519 (Alaska 1975) (refusing to allow parties to stipulate as to the content of jury instructions since the trial judge is responsible for correctly instructing the jury).

[33] *Sitka*, 644 P.2d at 234-36.

[34] *Id.*

[35] *Id.*

stipulation on a question of law. As in *Sitka*, the stipulation will not affect future consideration of the legal issue, will not impact non-parties, and will not unduly invade our prerogatives. We thus hold that the superior court erred by failing to use the stipulation to determine the regular rate of pay to calculate overtime pay. We vacate the damages award and remand for the court to calculate the damages using the stipulated rate to determine Ipalook's overtime compensation rate.[36]

D. The Superior Court Should Determine on Remand Whether AS 09.30.070(b) Applies to this Cause of Action.

The superior court awarded prejudgment interest from November 21, 1995, the date Ipalook filed her complaint. Ipalook argues that the court should have awarded prejudgment interest from the date of each pay period for which overtime was owed, because that is when the cause of action accrued. She argues that AS 09.30.070(b), which limits the award of prejudgment interest to the date the defendant received notice of the action, does not apply to this action.[37]

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[36] Because we hold that the superior court should apply the parties' stipulation on remand, we do not reach the issue of whether Ipalook's apartment would have been included in her "regular rate of pay" under AS 23.10.060(b) and the applicable state and federal regulations.

[37] AS 09.30.070 provides in relevant part:

> (b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day process is served on the defendant or the

To determine whether the superior court correctly calculated prejudgment interest, we must first determine whether AS 09.30.070(b) applies to this action. However, neither party adequately briefed this issue. In several recent cases, we have noted that AS 09.30.070(b) might only apply to actions for "personal injury, death, or damage to property," but we have not yet resolved this issue.[38]

In *Hanson v. Kake Tribal Corp.*, [39] we refused to reach the issue of whether AS 09.30.070(b) applied to a contract claim because neither party had adequately briefed the issue. However, we also refused to find that the issue had been waived, instead allowing the trial court to determine the issue on remand since prejudgment interest would have to be recalculated on remand anyway.[40] We again follow this procedure. Since we are remanding for

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> day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier. The written notification must be of a nature that would lead a prudent person to believe that a claim will be made against the person receiving the notification, for personal injury, death, or damage to property.

Ipalook argues that the parties in this case have "agreed otherwise" both through stipulation and through the application of AS 23.05.140.

[38] *See, e.g., Johnson v. Olympic Liquidating Trust*, 953 P.2d 494, 499 n.4 (Alaska 1998); *Hofmann v. von Wirth*, 907 P.2d 454, 455 n.2 (Alaska 1995).

[39] 939 P.2d 1320, 1330-31 (Alaska 1997).

[40] *Id.*

the court to recalculate the amount of overtime compensation, it would also have to recalculate the prejudgment interest award. Thus, as we did in *Hanson*, we direct the superior court to determine on remand whether AS 09.30.070(b) applies to this action.

IV. CONCLUSION

We AFFIRM the superior court's findings that Ipalook did not breach her fiduciary duties and reject TCC's arguments that the award of mandatory liquidated damages is unconstitutional. However, we VACATE and REMAND the damages award, because the superior court erred in failing to use the parties' stipulated regular rate of pay to calculate Ipalook's overtime compensation rate. On remand, the superior court should allow the parties to argue whether AS 09.30.070(b) applies to this action.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4FA-95-2745 Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jun. 24, 1997)

This is an action involving claims arising under the Alaska Wage and Hour Act, AS 23.10.050 *et seq.* The matter came on for bench trial on April 1, 1997. The court now enters its findings of fact and conclusions of law as follows:

I.

Findings of Fact

1. Plaintiff Catherine N. Ipalook ("Ipalook") claims that she was a nonexempt employee entitled to unpaid overtime and statutory liquidated damages, and also entitled to additional unpaid accrued leave. Defendant Dena' Nena' Henash a/k/a Tanana Chief's Conference, Inc. ("TCC") claims that Ipalook is an exempt employee: either an employee in a supervisory capacity and/or an

exempt executive employee; TCC further claims that the fact that Ipalook was TCC's president in the past prevents her from recovering anything in this action;

2. Ipalook was first employed by TCC as the Patient Hostel Manager ("PHM") at Fairbanks, Alaska on June 19, 1994 at 5:00 p.m.;

3. TCC's payroll change notice ("PCN") pertaining to Ipalook's hire in June 1994 shows a monthly payment of $1,916.65 to Ipalook, which amount TCC converted to an hourly rate of $11.05 an hour for entry into the employer's payroll system;

4. Ipalook also received an employer-provided apartment, located on the premises of the Patient Hostel, as part of her compensation;

5. TCC's written job description for the position of PHM requires the employee filling that position to be responsible 24 hours per day for the operation of the Patient Hostel and to be on call, including holidays, Sunday through Friday;

6. The Weekend Relief Manager ("WRM") would come on duty at the Patient Hostel each Friday to Sunday;

7. As PHM, Ipalook's work week started each Sunday at 5:00 p.m. and ended each Friday at 5:00 p.m. when the WRM came on duty;

8. The WRM was on duty at the Patient Hostel between Friday at 5:00 p.m. until Sunday at 5:00 p.m., when Ipalook would again take over her duties as PHM.

9. Ipalook worked as PHM from June 19, 1994 at 5:00 p.m. until her resignation effective August 18, 1995 at 5:00 p.m.;

10. Ipalook's being on call for 24 hours a day and being normally on the Patient Hostel premises 24 hours a day during Ipalook's workweek was required for the convenience of TCC and was a necessary part of Ipalook's performance of her duties as PHM;

11. Ms. Agnes Ostlund was TCC's normal WRM during the time when Ipalook was employed as PHM;

12. A comparison of TCC's listed job duties and description for Ipalook's position as PHM (Plaintiff's Exhibit 1) and TCC's listed job duties and description for the position of WRM (Plaintiff's Exhibit 58) shows that the day-to-day duties of both positions were essentially the same;

13. Ipalook as PHM performed additional duties to those performed by the WRM, but nonetheless the day-to-day duties of Ipalook as PHM and the WRM were essentially the same;

14. After Ipalook's employment as PHM had ended the WRM position became entitled to overtime during 1996 for the WRM's 48 hours of duty or hours worked at the Patient Hostel between Friday at 5:00 p.m. and Sunday at 5:00 p.m.;

15. During Ipalook's employment as PHM, there was a housekeeper employed at TCC's Patient Hostel between 9:00 a.m. and 3:00 p.m., Monday through Friday, with the housekeeper having an hour for lunch;

16. Ms. Robin Hebert, the housekeeper at the Patient Hostel, had been hired as housekeeper before Ipalook became PHM;

17. The housekeeper's job duties and hours at the Patient Hostel remained unchanged after Ipalook became PHM;

18. Historically TCC had treated the position of PHM as exempt from overtime; Ipalook was the second person to hold the position of PHM; the first person to hold the position of PHM was Bertha Moses. She was not treated as an exempt employee.

* * *

20. TCC never did an in-depth analysis or audit on Ipalook's position as PHM: TCC neither conducted a job-duty analysis on the position of PHM, nor conducted an interview of Ipalook concerning her actual job duties as PHM;

21. TCC had never performed an in depth – job analysis or audit on the actual job duties of Ipalook's position as PHM, TCC did not have the benefit of the testimony presented at trial about the nature of Ipalook's actual job duties as PHM;

22. While Ipalook as PHM performed some additional duties not performed by the WRM, Ipalook as PHM spent at least fifty percent (50%) of her time performing job duties, on a regular basis, identical to job duties performed by the WRM;

23. There is no evidence that Ipalook as PHM supervised the activities of the WRM. In fact, the evidence is to the contrary;

24. Blanche (Bessie) Williams, Ipalook's immediate supervisor, was designated on documents introduced into evidence as the "Patient Hostel supervisor" (See Plaintiff's Exhibits 55, 57);

25. Even though TCC supervisors stated and indicated, as a result of a grievance filed by Ipalook during 1994, that they wanted Ipalook to be the on-site supervisor at the patient Hostel, that never actually occurred;

26. Blanche (Bessie) Williams had actually assumed the supervisory duties related to the Patient Hostel, notwithstanding Ipalook's filed grievance as PHM;

27. Ipalook as PHM filled out time cards for employer TCC every two (2) weeks;

28. Blanche (Bessie) Williams, Ipalook's immediate supervisor, instructed Ipalook to fill out Ipalook's time sheets as PHM to show no more than forty (40) hours per week of hours worked;

29. Ipalook's job duties and responsibilities as PHM included (1) closing the door to the Patient Hostel, located at 1321 17th Avenue, Fairbanks, Alaska, each Sunday through Thursday evening at 10:00 p.m. each of those nights; (2) conducting an inspection of the building to ensure that the three (3) entrances were secured; and (3) confirming and ensuring that all visitors had left the Patient Hostel as required after visiting hours had ended (8:00 a.m. to 10:00 p.m.); listed job duties were not included in the actual job description.

30. TCC required Ipalook as the PHM to be on the premises and on call 24 hours a day, five (5) days a week; but could leave for short periods for personal business.

31. During normal sleep hours Ipalook had to respond to Patient Hostel client requests, following knocking on her apartment door at all hours, requesting, for example, (1) extra blankets; (2) instructions how to operate the thermostat; (3) reporting a disturbance in a near-by room or in the facility; and/or (4) requests to be let in the building after 10:00 p.m. (a patient having lost or forgotten his or her key);

32. Ipalook had to react and respond at any time during the day or night when the facility's fire alarm went off;

33. Ipalook was expected to respond to disturbances within the Patient Hostel, and Ipalook did in fact respond to disturbances within the facility at all hours of the day and night;

34. There were conferences and meetings, such as CPR classes, held in the conference room and/or in the lounge of the Patient Hostel.

35. During Ipalook's workweek, while Ipalook was on call 24 hours a day, Ipalook was not able to use the time effectively for her own purposes; there were no certain periods of time during which Ipalook was completely relieved of all duties as PHM during her work week;

36. Ipalook worked a total of 4669 unpaid overtime hours between June 19, 1994 and August 18, 1995; there was no contrary evidence presented; Ipalook's unpaid overtime hours were hours worked;

37. During the time Ipalook was employed as PHM with TCC, the state minimum wage was $4.75 an hour;

38. Ipalook earned more than 2½ times the state minimum wage during her TCC employment as PHM;

39. TCC claims that Ipalook's position as PHM was exempt from overtime as a "supervisory capacity" position. See AS 23.10.060(a);

40. 8 AAC 15.910(a) provides in relevant part as follows:

> (14) 'supervisory capacity' means those primary duties performed by an employee who is employed solely for the purpose of regularly assigning and directing the activities of other employees; and is responsible for results of the work performed; who does not perform duties regularly performed by the employees supervised, except for brief periods of time not to exceed 20 percent of the hours worked in the workweek; for the purpose of AS 23.10.060, 'supervisory capacity' does not apply to an employee required by the employer to perform those activities on an intermittent or substitute basis during the course of employment;

41. None of the eleven (11) separate and specific job duties listed on Ipalook's written TCC job description for the position of PHM (Plaintiff's Exhibit 1) includes the duty to supervise any other employee at the Patient Hostel;

42. At least fifty percent (50%) of Ipalook's weekly job duties as PHM were spent doing the same job duties as those done by the WRM;

43. There is no evidence that Ipalook as PHM actually supervised the activities and job duties of the WRM;

44. Lodging was provided to Ipalook throughout her employment as part of her compensation as PHM;

45. Ipalook's compensation as PHM was a combination of $11.05 an hour plus the fair value of her apartment provided at the Patient Hostel;

46. TCC paid Ipalook semi-monthly during the time Ipalook worked as PHM (see Plaintiff's Exhibit 8);

47. TCC also claims Ipalook's position as PHM is exempt from overtime as an executive position. See AS 23.10.055(9);

48. 8 AAC 15.910(a) provides in relevant part as follows: (7) 'executive employee' means an employee

> (A) whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized branch, department, or subdivision of the enterprise;
>
> (B) who customarily and regularly directs the work of two or more other employees;
>
> (C) who has authority to hire or fire or effect any other change of status of other employees or whose suggestions or recommendations regarding these kinds of changes are given particular weight;
>
> (D) who customarily and regularly exercises discretionary authority;
>
> (E) who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who earns at least two and one half times the state minimum wage per hour for the first 40 hours of employment each

> week and who does not devote more than 40 percent of the employee's weekly hours to activities that are not directly and closely related to the work described in this paragraph or paragraphs (1) or (11) of this section; and
>
> (F) who is compensated on a salary basis;

49. The court needs to analyze each subsection under 8 AAC 15.910(a) (7) to determine whether Ipalook's position as PHM satisfies the regulatory requirements of "executive employee";

50. 8 AAC 15.910(a) (7), subsection (A) provides as follows:

> (A) whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized branch, department, or subdivision of the enterprise;

51. The Patient Hostel is a customarily recognized branch within the meaning of subsection (A);

52. In practice, Blanche (Bessie) Williams had usurped the management functions of the Patient Hostel, notwithstanding Ipalook's filed grievance as PHM;

53. 8 AAC 15.910(a) (7), subsection (B) provides as follows:

> (B) who customarily and regularly directs the work of two or more other employees;

54. TCC claims that Ipalook customarily and regularly directed the work of the housekeeper and the WRM;

55. Even though other named employees at the Patient Hostel were identified, there were essentially only

two other positions which TCC claims Ipalook as PHM supervised: the housekeeper position and the WRM position;

56. Even if there were other housekeepers and other WRMs, there is no evidence to show that Ipalook customarily and regularly directed the work of the WRM position;

57. The only other employee which TCC claims Ipalook as PHM supervised is the housekeeper. Giving TCC the benefit of the doubt, the evidence could support the finding that Ipalook was responsible as PHM for seeing that the housekeeper did her job. But given Blanche (Bessie) Williams' intervention and assumption of management functions at the Patient Hostel, it is unclear whether Ipalook as PHM actually had the authority to direct the housekeeper's duties;

58. Even if Ipalook as PHM has the authority to customarily and regularly direct the work of the housekeeper at the Patient Hostel, Ipalook only had that authority over one employee, not two;

59. So the employer did not prove the requirements of subsection (B) under the facts of this case;

60. 8 AAC 15.910(a)(7), subsection (C) provides as follows:

> (C) who has authority to hire or fire or effect any other change of status of other employees or whose suggestions or recommendations regarding these kinds of changes are given particular weight;

61. The evidence before the Court established that Ms. Ipalook did not have the authority to hire or fire employees of the PHM. The evidence also shows that while PHM, Ms. Ipalook had the exclusive authority to propose the hire of employees of the PHM, which could be approved or disapproved by Ms. Williams. As such, Ms. Ipalook's suggestions respecting these types of decisions were given particular weight.

62. Based upon Ipalook's grievance, Ipalook as PHM was supposed to have had the types of authority set forth in subsection (C). In actual practice, Ipalook did not have that authority.

* * *

63. In the one instance where Ipalook as PHM docked the housekeeper some hours as LWOP for tardiness, Ipalook's action was changed and overturned by Blanche (Bessie) Williams, who changed the housekeeper's LWOP status back to paid status;

64. Even though Ipalook's decision was later upheld by TCC supervisors over Ms. Williams, the housekeeper still remained paid because of the passage of time and because of the "unfairness to the employee". In other words, Ms. Williams' decision in effect stood;

65. Ipalook as PHM clearly did not have the authority to hire or fire any employee; Ipalook did not have the authority to change or raise any wages;

66. Ipalook as PHM was supposed to have had the authority to make suggestions which were given weight; however, in actuality, and despite the grievance process, there is no evidence that the results of the grievance

process ever took effect, and there is no evidence that any recommendation made by as PHM was given any weight by Blanche (Bessie) Williams;

67. So the employer did not prove the requirements of subsection (C) under the facts of this case; but did prove the exception under 8 AAC 15.510(a)(7)(C).

68. 8 AAC 15.910(a)(7), subsection (D) provides as follows:

> (D) who customarily and regularly exercises discretionary authority;

69. Ipalook may have had some discretionary authority as to when things were to be bought for the Patient Hostel; but Ipalook had no authority to make the actual purchases for the Patient Hostel, other than minor items from time to time out of accumulated laundry funds;

70. Blanche (Bessie) Williams had taken the petty cash function away from Ipalook as PHM; Ipalook transferred accumulated Patient Hostel room funds, laundry funds, and telephone funds to TCC's administrative offices weekly;

* * *

72. The general work schedules of the WRM and the housekeeper positions were established by TCC administration and policy, however, Ms. Ipalook did schedule replacement WRM when Ms. Ostlund did not work, and did arrange for relief housekeepers in the absence of Ms. Hebert. Additionally, the evidence indicates that Ms. Ipalook did approve prearranged absences (both full day and partial day) by the regular housekeeper, Ms. Hebert.

73. Ipalook as PHM had no policy-making authority regarding the Patient Hostel;

74. So the employer did not prove the requirements of subsection (D) under the facts of this case;

75. 8 AAC 15.910(a)(7), subsection (E) provides as follows:

> (E) who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who earns at least two and one half times the state minimum wage per hour for the first 40 hours of employment each week and who does not devote more than 40 percent of the employee's weekly hours to activities that are not directly and closely related to the work described in this paragraph or paragraphs (1) Or (11) of this section;

76. The Patient Hostel was a retail or serve [sic] establishment, and Ipalook as PHM was paid at least 2½ times the state minimum wage;

77. The 40% rule under subsection (E) applies. Ipalook's PHM job duties, as performed, do not satisfy the 40% test as to the housekeeper and as to housekeeping duties; No more than 25% of Ipalooks duties were similar in duties performed by the housekeeper.

78. Ipalook as PHM may have devoted about 20% of her duties to housekeeping duties. Although Ipalook performed housekeeping duties as PHM on an on-going and regular basis, Ipalook did not perform housekeeping duties anywhere near the required 40%;

79. However, Ipalook as PHM did not supervise or direct the duties of the WRM. In fact Ipalook was sometimes not even physically present at the Patient Hostel on the weekends;

80. Ipalook as PHM devoted at least 50% of her time performing duties identical to the duties performed by the WRM; TCC has not proven elements of 8 AAC 15.910(a)(7)(E);

81. The identical type of work duties which the WRM performed, and which Ipalook performed at least 50% of her time as PHM on a regular basis, were not work duties performed along specialized or technical lines requiring special training, experience or knowledge within the meaning of 8 AAC 15.910(a) (1) (F);

82. So the employer did not prove the requirements of subsection (E) under the facts of this case;

83. 8 AAC 15.910(a) (7), subsection (F) provides as follows:

(F) who is compensated on a salary basis.

84. The terms "on a salary basis" are not defined in the AWHA nor in regulations promulgated thereunder;

85. Ipalook as PHM was docked four (4) hours of pay, or leave without pay ("LWOP"), for the pay period ending January 10, 1995;

86. There is no evidence that Ipalook was docked in pay because of any safety violation; no safety regulations were presented into evidence;

87. Ipalook as PHM was not paid "on a salary basis" because in docking Ipalook's pay, TCC violated the

terms of 29 CFR Section 541.118, or the definition of "a salary basis" under the Fair Labor Standards Act regulations;

88. So the employer did not prove the requirements of subsection (E) under the facts of this case;

89. TCC's policy was to pay accrued personal leave for every hour an employee like Ipalook as PHM worked (see Plaintiff's Exhibit 36);

90. TCC's personnel policies in force and effect during Ipalook's employment as PHM describe specific personnel leave accrual procedures (see Plaintiff's Exhibit 50, Section XI, E. therein);

91. TCC did not include any unpaid overtime hours in its calculation of the amount of accrual personal leave owed and paid to Ipalook as PHM following her resignation;

92. TCC paid Ipalook $1,056.49 in accrued personal leave in September 1995, which payment did not include payment for any unpaid overtime hours;

93. Ipalook as PHM accrued 332.122 net personal leave hours during the period ending June 17, 1995, and Ipalook as PHM also accrued 70.063 net personal leave hours during the period ending August 18, 1995;

94. TCC owed Ipalook as PHM a total of $4,444.15 in accrued personal leave as of August 18, 1995;

96. TCC underpaid Ipalook $3,387.66 in accrued personal leave;

TCC'S Counterclaims and Affirmative Defenses

97. Ipalook breached no fiduciary duty owed to the corporation while she was TCC President between March 1990 and March 1991.

98. The course of conduct followed by both Ipalook as TCC President and Mr. Will Mayo ("Mayo") as TCC President was that if a problem came to her (his) attention as President, then each would deal with and respond to that particular problem;

99. During Ipalook's tenure as TCC President between March 1990 and March 1991, no problem regarding overtime or wage and hour matter came to her attention as president;

100. Ipalook as TCC President did not fail to disclose any specific knowledge she (Ipalook) should have disclosed about the position of PHM while she was TCC President; there is no evidence Ipalook had any specific knowledge about the job duties of the position of PHM while she (Ipalook) was TCC President;

101. Ipalook breached no fiduciary duty to TCC following her tenure as the President either. TCC historically treated the position of PHM as a position exempt from overtime; there were no problems associated with the position of PHM while Ipalook was TCC President; the issue of whether the position of PHM was exempt or nonexempt only came to Ipalook's attention after her employment as PHM had ended in August 1995;

102. Even though the parties had followed, in the past, a course of conduct treating the position of PHM as exempt from overtime, and even though the parties may

have felt that what they were doing was appropriate, the Alaska Wage and Hour Act, and case authorities related thereto, provide that entitlement to overtime hours can not be waived;

103. The fact that Ipalook, as a former TCC President and later as PHM, went through a grievance process claiming in part that as PHM she was a supervisor, does not preclude Ipalook from later raising the issue of her entitlement as PHM to overtime compensation, if in fact Ipalook's position of PHM was non-exempt, as the court has concluded in this litigation that it was;

104. Ipalook is not estopped from raising her entitlement to unpaid overtime compensation under the Alaska Wage and Hour Act. Ipalook is neither estopped because she filed a grievance while working as PHM, nor because she was a former President of TCC from March 1990 to March 1991;

105. When a problem came to Mayo's attention as TCC President after March 1991, Mayo would direct that problem to the appropriate administrative head to deal with that issue;

106. Although Mayo as TCC President has assumed and acknowledged the ultimate responsibility for personnel matters during the time he has been TCC President, Mayo himself as TCC President took no specific action to investigate, nor to examine what was done regarding the process of classifying of the position of PHM as a supposedly exempt position, since the time he began as TCC President in March 1991 to present;

107. Since March 1991, or the time Mayo first became TCC President to present, Mayo, as well as his department head(s) and TCC's personnel officer(s), have all relied upon the historical course of conduct treating the position of PHM as exempt; the lack of any problems in the past related to the position of PHM (other than Ipalook's grievance as PHM); TCC's written job description for the position of PHM; and PCNs related to the position of PHM;

108. Similarly, Ipalook as TCC President from March 1990 to March 1991 relied upon her administrative heads in personnel matters as authorized by TCC's own personnel policies (see Exhibits L; 50), as later did Mayo as TCC President; Mayo took over as TCC President in March 1991 following Ipalook's resignation as TCC President for personal health reasons;

CONCLUSIONS OF LAW

1. The Alaska Wage and Hour Act ("AWHA" or "Act"), AS 23.10.050.-.150, requires that all employees be paid at overtime rates unless they fall within an exemption to the Act's overtime provisions. AS 23.10.060(a) (exempting various classifications of employees from AWHA).

2. At issue here are the following categories of exemption: employees employed in a bona fide executive, administrative or professional capacity . . . ", AS 23.10.055(9), and those who are in a "supervisory capacity", AS 23.10.060(a). These four (4) exemptions are defined in 8 AAC 15.910(a) (1),(11) (7) and (14).

3. These exemptions "are to be narrowly construed against the employer". *Dayhoff v. Temsco Helicopters, Inc.* ("*Temsco II*"), 848 P.2d 1367, 1371-72 (Alaska 1993). "If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be ruled non-exempt". *Id.* at 1372. The burden of establishing an exemption is on the employer. *Id.*

4. As a result of previous pretrial motion practice, the court previously found and concluded that there were no medical services provided at the Patient Hostel, and that the Patient Hostel was not a hospital under AS 23.10.060(d) (13).

5. As a result of trial, the court reaffirms this finding and this conclusion.

6. As a result of previous pretrial motion practice, the court previously found and concluded that Ipalook's actual job duties as PHM were not the job duties of "an individual employed in a bona fide . . . administrative, or professional capacity" under AS 23.10.055 (9); and that Ipalook's actual job duties as PHM did not satisfy the requirements of "administrative employee", nor of "professional employee", as further defined under 8 AAC 15.910(a) (1) ("administrative employee") and 8 AAC 15.910 (a)(11) ("professional employee") respectively.

7. As a result of trial, the court reaffirms these findings and these conclusions.

8. Ipalook as PHM was not employed in a supervisory capacity under 8 AAC 15.910(a) (14) based upon the evidence.

9. Ipalook was not an exempt executive employee under 8 AAC 15.910(a) (7) ("executive employee") based upon the evidence.

10. The terms "salary basis" are not defined in the AWHA or in regulations adopted under this title: "(t)erms used in AS 23.10.050-23.10.150 shall be defined as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it". AS 23.10.145.

11. Overtime pay is one and one-half times the regular rate. AS 23.10.060(b). The amount of unpaid overtime compensation or damages for an employee under the AWHA is doubled to account for liquidated damages. Former AS 23.10.110(a).

12. The court concludes that it is unfair to base Ipalook's regular rate on Ipalook's compensation of $11.05 per hour, plus the hourly equivalent of the fair value of the apartment provided, because Ipalook in fact received the apartment;

13. Thus the court concludes that regular rate for purposes of calculating the amount of Ipalook's unpaid overtime should be based upon $11.05 per hour, instead of being based upon a combination of $11.05 an hour, plus the hourly equivalent of the fair value of the apartment, or the amount of $15.38 an hour which includes the fair value of the apartment.

14. Consequently the appropriate overtime rate, at time and a half, to be multiplied against Ipalook's 4669 hours of unpaid overtime worked, is $16.58 an hour, instead of the figure of $23.08 an hour used by Ipalook's

expert witness Ms. Jacqueline Briskey, CPA, [the higher amount of $23.08 an hour includes the hourly equivalent of the fair value of the apartment (see Plaintiff's Exhibit 26)].

15. Ipalook is entitled to $77,412.02 in unpaid overtime compensation, or 4669 unpaid hours multiplied by $16.58 per hour.

16. Ipalook is also entitled to $77,412.02 as liquidated damages under former AS 23.010.110(a), which liquidated damages statute was in force and effect during Ipalook's employment as PHM between June 10, 1994 and August 18, 1995.

17. Ipalook is entitled to appropriate prejudgment interest on the amount of unpaid overtime compensation from the dates the unpaid overtime was originally due, pursuant to AS 23.05.140(a), but not on the liquidated damages amount.

18. Ipalook is also entitled to unpaid accrued personal leave in the amount of $3,387.66, plus appropriate prejudgment interest from the date of Ipalook's termination of employment on August 18, 1995, pursuant to AS 23.05.140 (b).

19. The court concludes that TCC's pending counterclaims against Ipalook are not viable counterclaims, based upon TCC's historical corporate course of conduct in treating the position of PHM as an exempt position.

20. The fact that the court has found that Ipalook's position as PHM is non-exempt from overtime compensation does not render Ipalook personally liable as a former president of TCC.

21. Following Ipalook's departure as TCC President, Mayo as TCC President has done the same thing Ipalook did, by himself not personally conducting any actual investigation into the proper exempt or nonexempt status of the position of PHM.

22. Mayo's tenure as TCC President since March 1991 would, in itself, be a subsequent intervening cause in any event, given that Ipalook left as TCC President in March 1991; given that Mayo's tenure as TCC President started in March 1991; and given the lapse of time between March 1991 and June 19, 1994, or the date when Ipalook started as PHM. These factors combine together as a subsequent superseding cause in any event to preclude any personal liability on Ipalook's part, for any alleged act or alleged omission on her part, which Ipalook as TCC President may have done, or may not have done, relating to the proper wage and hour classification of the position as PHM as exempt or nonexempt.

23. Accordingly the court does not find it necessary to address Ipalook's contingent third-party claim over against TCC President Mayo. However, if the court had to determine Ipalook's third-party claim, the court would find that even though the litigation position taken by Ipalook in this action is contrary to, or different from, the position taken by TCC during the time Ipalook was TCC President regarding the status the position of PHM for purposes of eligibility for overtime compensation, that Ipalook would, nonetheless, have a viable third-claim over against Mayo as TCC President in an amount equal to any damages TCC could have, or would have, against Ipalook individually as former TCC President. The court has previously concluded and listed those factors

described above (including the lapse of time between Ipalook's departure as TCC President, Mayo's commencement as TCC President in March 1991, and the date of Ipalook's later hire as PHM in 1994, along with the failure of Mayo himself to have investigated personally the proper classification of PHM as exempt or nonexempt), which singularly or together constitute a subsequent superseding cause in any event. The court thus further finds and concludes that it is highly unforeseeable that any alleged act or alleged omission by Ipalook as TCC President during March 1990 to March 1991, could have caused, or did in fact cause, TCC's present liability for Ipalook's unpaid overtime as PHM during the period from June 19, 1994 to August 18, 1995.

24. If the court had discretionary authority whether or not to award liquidated damages, the court would not award liquidated damages against TCC.

25. TCC acted in good faith, based upon TCC's corporate course of conduct since the inception of the position of PHM; based upon the grievance filed by Ipalook as PHM; and based upon TCC's PCNs for the position of PHM.

26. However, the parties can not waive entitlement to overtime payments, as TCC's own wage and hour memoranda of record acknowledge. The court thus hereby enters judgment in favor of Ipalook and against TCC for the amounts and items described above.

27. Ipalook as prevailing party in this action may apply for attorney's fees pursuant to AS 23.10.110(c) and for costs pursuant to Alaska R.Civ.P. 79.

ENTERED at Fairbanks, Alaska this 20 day of June, 1997.

/s/ Jay Hodges
Honorable Jay Hodges
Superior Court Judge

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-3626

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4FA-95-2745 Civil

JUDGMENT

(Filed Jun. 24, 1997)

After trial to the court and following entry of findings and fact and conclusions of law,

IT IS ORDERED that judgment is entered for plaintiff Catherine N. Ipalook against defendant Dena' Nena' Henash a/k/a Tanana Chiefs Conference, Inc. for unpaid overtime compensation in the amount of $77,412.02; statutory liquidated damages under former AS 23.10.110(a) in the amount of $77,412.02; prejudgment interest at the rate of 15.5% per annum on the unpaid overtime compensation [and not on the liquidated damages awarded under former AS 23.10.110(a)] through April 4, 1997 in

the amount of $16,402.13; plus per diem prejudgment interest of $2,530.99 until date of entry of judgment 6/20/97; costs in the amount of $5,974.03 encludes [sic] expert witness fees. 7/28/97 and attorney's fees as provided by former AS 23.10.110(c) in the amount of $67,311.00; for a subtotal amount of $247,042.19;

IT IS FURTHER ORDERED that judgment is entered for plaintiff Catherine N. Ipalook against Dena' Nena' Henash a/k/a Tanana Chiefs Conference, Inc. for unpaid accrued personal leave in the amount of $3,387.66; prejudgment interest at the rate of 15.5% per annum through April 4, 1997 in the amount of $717.86; plus per diem prejudgment interest of $110.77 until date of judgment 6/20/97 for a further subtotal amount of $4216.29;

IT IS FURTHER ORDERED that the total judgment amount for Plaintiff Catherine N. Ipalook and against Defendant Dena' Nena' Henash a/k/a Tanana Chiefs Conference, Inc. entered herein is $251,258.48, which total judgment amount represents a combination of the above subtotals of (1) the amount of unpaid overtime compensation, liquidated damages, appropriate prejudgment interest, costs, and attorney's fees due plaintiff Ipalook as set forth above, plus (2) the amount of unpaid accrued personal leave and appropriate prejudgment interest due Plaintiff Ipalook as set forth above;

This total judgment amount shall bear interest at the rate of 10.5 percent per annum from the date of entry of judgment until paid in full.

LET EXECUTION ISSUE.

ENTERED at Fairbanks, Alaska this 20 day of June, 1997.

/s/ Jay Hodges
Honorable Jay Hodges
Superior Court Judge

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

MOTION TO RECONSIDER APPLICATION OF MANDATORY LIQUIDATED DAMAGES.

(Filed Apr. 28, 1997)

COMES NOW, Tanana Chiefs Conference, Inc., defendant in the above captioned matter, to request reconsider [sic] of the application of mandatory liquidated damages in the judgment rendered by the Court, for the reasons more fully set out in the accompanying memorandum.

Respectfully submitted this 28th day of April, 1997.

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Plaintiff

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER APPLICATION OF MANDATORY LIQUIDATED DAMAGES.

(Filed Apr. 28, 1997)

The Court has found that Ms. Ipalook was a non-exempt employee for the purposes of the payment of overtime during her tenure as the Patient Hostel Manager for TCC. The Court awarded Ms. Ipalook $77,412.02 in compensatory damages for unpaid overtime, and an equal amount as statutory liquidated damages. TCC requests the court to reconsider its ruling awarding liquidated damages to Ms. Ipalook in the above action. In its decision, the Court held that TCC had proven that the failure to pay Ms. Ipalook overtime was made in good faith, and that the defendant had reasonable grounds for classifying the Patient Hostel Manager position as an exempt position for the purposes of overtime.

I. STATEMENT OF ISSUE: DOES THE COURT HAVE DISCRETION IN AWARDING LIQUIDATED DAMAGES.

The Alaska Wage and Hour Act, [AWHA] authorizes a Court to award liquidated damages in an amount equal to the amount of unpaid overtime recovered by a plaintiff. *See* A.S. 23.10.110(a) Prior to 1995, the law in Alaska was that liquidated damages were mandatory. *Alaska Int'l Industries, Inc. v Musarra,* 602 P.2d 1240 (Alaska 1979); *McKeown v Kinney Shoe Corp.,* 820 P.2d 1068 (Alaska, 1991). In short, the Court lacked discretion to deny liquidated damages.

In 1995, the Legislature enacted statutory amendments which added subsections (d)-(j) now appearing in the statute. The amendments now provide Courts with the discretion with regard to the award liquidated damages in cases where the "act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060." id.

This development of AWHA on this issue mirrors the development of the federal Fair Labor Standards Act, [FSLA] which is discussed by the Court in the *Musarra,* 602 P.2d, at 1248-1249. Essentially, the original FLSA also required mandatory liquidated damages. id. in 1947, Congress amended the FLSA to allow Courts discretion in awarding liquidated damages in cases of employer "good faith" in not paying overtime. The 1995 amendments to the AWHA reflect a similar policy change in Alaskan State law. The question before the Court is whether the Court has discretion to award liquidated damages as

allowed under the 1995 amendments or whether the Court is mandated to award liquidated damages as provided in Alaska law prior to the amendments.

II. ARGUMENT

A) Introduction

Ms. Ipalook worked as the Patient Hostel Manager from June 19, 1994 to August 18, 1995. The statute in question provides that "Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act." Sec. 4, ch 37, SLA 1995 This section would appear to apply to subsections added by the bill. The bill's effective date was August 22, 1995, and it is upon this basis that Ipalook argues that mandatory liquidated damages applies.

The FSLA and the AWHA differ in a number of respects. Most notably, the policies behind the FSLA and the AWHA provisions relating to liquidated damages are substantially different. Under the FSLA, liquidated damages are considered to be a recovery "as compensation for delay in payment of sums due under the Act." *Brooklyn Savings Bank v O'Neil,* 89 L.Ed. 1296, 1324 (1945) In other words, liquidated damages are compensation for damages suffered by a worker which are too obscure and difficult to prove. id. This includes damages attributable to lost interest, which would normally be addressed through the award of pre-judgment interest under the Alaskan system. To avoid double compensation under the FSLA, pre-judgment interest is not allowable for an award of actual damages for the failure to pay overtime under the FSLA. id. Consequently, the federal courts have

held that award of liquidated damages is not punitive. *Overnight Motor Transp. Co. v Missel,* 86 L.Ed. 1682, 1690-1691 (1942).

Alaskan law notably differs on this point. Liquidated damages under the AWHA *are* punitive, and are intended as a deterrence for employers to assure payment of overtime to employees. *Alaska Int'l Industries, Inc. v Musarra,* 602 P.2d 1240 (Alaska 1979); *McKeown v Kinney Shoe Corp.,* 820 P.2d 1068 (Alaska, 1991). In Alaska, pre-judgment interest is paid on an award of actual compensatory damages of the unpaid overtime. *Bobich v Stewart,* 843 P.2d 1232, 1237 (Alaska, 1992). On the other hand, the same Court held

> We have held that under the AWHA, liquidated damages are a form of punitive damages, not a substitute for compensatory damages. *Gore v Schlumberger Ltd.,* 703 P.2d 1165, 1166 (Alaska, 1985). Because a plaintiff has no right to use liquidated damages before they are actually awarded, an award of prejudgment interest would compensate her for a nonexistent loss. Therefore, we hold as a matter of public policy that under the AWHA, an employee may not recover prejudgment interest for liquidated damages.

id, at 1236-1237. The thrust of the *Bobich* case is two fold. First, the right to liquidated damages does not arise prior to the entry of judgment. Second, liquidated damages under AWHA are punitive and intended as a deterrent to employers. Consequently, in awarding liquidated damages, the Court must consider these factors.

B) The Statutory Savings Clause Only Relates To Vested Rights, Which Does Not Include The Right To Liquidated Damages.

With regard to the first consideration, the right to compensatory damages (unpaid overtime) relate to "wages earned for hours worked on or after the effective date" of the 1995 amendments. Clearly the right to these damages arose under operation of the pre-'95 statute. However, as noted above, the right to liquidated damages does not arise prior to the entry of judgment against the employer. *Bobich v Stewart*, supra. Clearly, Ms. Ipalook's right to liquidated damages did not arise prior to the entry of judgment in this case, which is well after the 1995 amendments to the AWHA.

At best, Sec. 4, ch 37, SLA 1995, which provides that "Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act," is a saving clause. In *Bidwell v Scheele*, 355 P.2d 584 (Alaska, 1960) the Court discussed the effect of such a saving clause on vested and unvested rights. As a general matter, repeal of a statute cannot extinguish a vested right. *id, explained at State v Kaatz*, 572 P.2d 779 (Alaska, 1977). However, where the rights in question do not vest prior to the effective date of the statutory amendments, the amendments should apply. *Bidwell v Scheele*, 355 P.2d, at 587; *State v Kaatz*, 572 P.2d, at 779.

In this case, the rights to compensatory damages vested prior to '95 amendments, and would be governed by the statute in effect then. The right to liquidated damages, however, vested at the time of entry of the

judgment – after the '95 amendments, – and would be governed under current law.

C. **State Constitutional Concerns.**

Such a holding is consistent with State Constitutional concerns raised by the change in the statute. Alaska Equal Protection analysis uses a single test rational basis test in reviewing State law. *Isakson v Rickey,* 550 P.2d 1 (Alaska, 1978). The test is a sliding scale which provides greater scrutiny of a statute as it may apply to fundamental rights or suspect classifications. id. However, the root concern is that a legislative action must bear a fair and substantial relation to a legitimate governmental purpose. *Commercial Fisheries Entry Comm'n v Apokedak,* 606 P.2d 1255 (Alaska, 1980).

In construing the AWHA, the Court must consider the punitive and deterrent policy goals of the liquidated damage provisions of the AWHA. In particular, the Court must consider if the mandatory application of liquidated damages to a good faith employer bears a fair and rational relationship to the legislative objective to deter willful non-payment of overtime. In this case, it clearly does not.

By its very definition, punitive awards seek to accomplish prospective goals – i.e. in this case, the deterrence of non-payment of overtime by an employer. When the state policy provided for mandatory liability for punitive damages, the legislative goal was to put all employers on notice, and coerce employers to pay overtime even, if they had a good faith believe [sic] that the employee was exempt from the payment of overtime. While this was the state legislative policy, mandatory

liquidated damages bore a fair and rational relationship to this policy.

However, there is no rational nexus between the imposition of mandatory liquidated damages to a good faith employer, when the state policy has changed. In fact, retroactive application of such mandatory damages to a good faith employer would be contrary to current state policy, which is to recognize a good faith exemption to such liquidated damages. There is no deterrent value in the prospective application of a discarded policy. Rather, such application merely gives life to the otherwise dead hand of an outmoded policy, which bears no rational relation to the legislative objectives intended by the legislature. It is clear that the Alaska legislature intended to deter the willful failure to pay overtime, rather than to punish an employer whose omissions were premised upon good faith. The application of liquidated damages to a "good faith" employer does not further the underlying policy goals of the AWHA as amended. The retroactive application of the pre-1995 statute fails to rationally relate to the purpose of AWHA as it existed prior to 1995 or in its current form.

In short, the change in policy of the AWHA severs the nexus between prospective deterrence and the legislative objective contained in the statute. Under such circumstances, the application of this policy becomes totally unrelated to the proscriptive purposes of liquidated damages to deter future employers from *willfully* failing to pay overtime, rather than the retrospective impacts of applying the pre-1995 law. Thus the change in policy renders the retroactive application of liquidated damages

constitutionally suspect under Alaskan Equal Protection analysis.

D. Recent U.S. Supreme Court Cases On Punitive Damages.

Recently, a series of decisions by the United States Supreme Court has addressed the issue of punitive damages relative to substantive and procedural due process/equal protection concerns. The U.S. Supreme Court has recently addressed substantive due process/equal protection concerns respecting punitive awards in several cases. The Court noted in *Pacific Mut. Life Ins. Co. v Haslip*, 113 L.Ed 2d 1 (1991), that punitive award of a judgment may be unconstitutional [sic] excessive, but had failed to articulate a standard of constitutional review. In *TXO Production v Alliance Resources*, 125 L.Ed. 2d 366 (1993) the Court split offering several opinions with regard to substantive and procedural due process and equal protection review of the punitive damage awards. Generally, however, the opinions rejected a strict nexus between the size of compensatory and punitive damages. Of particular note was the concurring opinion of Justice Kennedy, who suggested that the focus of inquiry should not be on the size of the award, but rather the reasons for it. He stated,

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards. . . . Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational

> concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.

125 L.Ed. 2d, at 385. In short, the opinions in *TXO* address the substantive due process/equal protection concerns which, at a minimum, demand a nexus between the goal of deterrence and retribution and the award of punitive damages. In the case of the AWHA, the constitutional principal would suggest that there must be a nexus between the deterrence goal and the application of the punitive damages. But given the court's finding that TCC was a good faith employer respecting the classification of Ms. Ipalook, the nexus between deterrence and the punitive damages seems highly suspect.

In *Honda Motor Co. v. Oberg*, 129 L.Ed. 2d 336 (1994) the Court addressed procedural due process concerns of punitive damage awards. In that case, the Court held that Oregon's failure to provide judicial review of an award of punitive damages was violative of the Fourteenth Amendment and Due Process Clause of the U.S. Constitution. The Court employed an analysis which compared procedures for punitive awards to traditional common law practice. In particular, the Court noted that punitive damages pose an acute danger of arbitrary deprivation of property. Traditionally, common law provided discretion with the courts to prevent arbitrary awards. id, at 349. And the Court held that judicial review, and *inter alia*, judicial discretion to review such awards was a means which common law traditionally has employed to prevent such arbitrary awards. A State legal system which deviates from judicial review of such awards, or which

severely limits meaningful judicial review in derogation of the traditional common law, is suspect.

Applying the procedural due process/equal protection analysis of *Honda* to the Alaska AWHA, it can only be considered that the lack of judicial review and discretion raises constitutional concerns. The 1995 amendments properly apply the *Honda* principals to assure due process are addressed.

In summary, the application of mandatory liquidated damages which existed in the '95 statute, may be [sic] now be Constitutionally suspect under recent procedural and substantive due process analysis of U.S. Supreme Court.

CONCLUSION

The Court should deny the imposition of mandatory liquidated damages in this case because, the saving clause contained in the '95 amendments does not apply to unvested rights such as the liquidated damages, and that imposition of mandatory liquidated damages in this situation is constitutionally suspect under both the state and federal constitutions.

Respectfully submitted this 28th day of April, 1997

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Plaintiff

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4FA-95-2745 Civil

PLAINTIFF IPALOOK'S CONTINGENT SUPPLEMENTAL OPPOSITION TO DEFENDANT TCC'S MOTION FOR RECONSIDERATION

Without consenting expressly or by implication to litigating Defendant TCC's untimely and waived constitutional arguments set forth in Defendant TCC's overlength motion for reconsideration, Plaintiff Ipalook files the following supplemental opposition addressed to Defendant TCC's untimely, waived, or otherwise legally unsupportable constitutional claims, (contingent upon the court's denying Plaintiff Ipalook's pending motion to strike).

The mandatory exaction of liquidated damages for violation of wage and hour provisions of this chapter is not violative of due process of law. *See Overnight Motor Transp. Co. v. Missel*, 316 US 572, 86 LEd 1682 (1942)

rehearing denied 87 LEd 563) (*"Missel II"*). *Missel II* states and holds as follows:

> In the Circuit Court of Appeals it was held that the liquidated damages provision . . . 29 USCA Section 286(b), was mandatory on the courts, regardless of the good faith of the employer or the reasonableness of his attitude. Petitioner attacks this conclusion as a denial of due process . . . Petitioner points out that if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act . . .
>
> Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay [the required statutory wages] are compensation, not a penalty or punishment by the government . . . *Nor can it be said that the exaction is violative of due process.* It is not a threat of criminal proceedings or prohibitive fines, such as have been held beyond legislative power by the authorities cited by petitioner. Even double damages treated as penalties have been upheld as within constitutional power. (emphasis added) *Id.*, 86 LEd at 1690-1691.

The rights of employees under the Fair Labor Standards Act are statutory rights, not vested rights protected by the Fifth Amendment to the U.S. Constitution. *Kam Koon Wan v. E.E. Black, Limited*, 75 F.Supp 553, 563 (D.C. Hawaii 1948).

Congress had the constitutional right to prescribe, under 29 USC Section 216(b), liquidated damages mandatorily recoverable at double the amount of overtime, and until those provisions should be amended, courts are required to enforce them. *J.F. Schneider & Son, Inc. v. Justice*, 168 S.W.2d 591, 593 (KY 1943).

The provision under 29 USC Section 216(b), stating that an employer who violates the wage and hour provisions shall be liable for unpaid minimum wages or unpaid compensation and for an equal amount as liquidated damages, is "mandatory"; and a federal district court has no authority to exercise discretion in awarding liquidated damages. *Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98, 110 (4th Cir. 1942) ("Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary . . . yet no matter how much we lament its harshness, the Section appears to be mandatory and virtually all the courts have so construed it").("*Missel I*"), affirmed, 316 US 572, 86 LEd 1682 (1942), ("*Missel II*"), reh denied, 317 US 706, 87 LEd 563; *Calaf v. Gonzales*, 127 F.2d 934, 938 (Cir. Puerto Rico 1942); ("This provision is mandatory in its statement and there is no authority in the district court to exercise discretion in awarding liquidated damages"); *Strand v. Garden Valley Telephone Co.*, 51 F.Supp. 898, 904 (D.C. Minn. 1943). ("The right to damages for failure on the part of the employer to pay . . . is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between the parties").

DATED at Fairbanks, Alaska this 12 day of May, 1997.

LAW OFFICES OF JAMES M.
HACKETT, INC

/s/ James M. Hackett
James M. Hackett
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12 day of May 1997, a true and correct copy of the foregoing document was *Hand delivered* by Due Process courier service on

Mr. Mike Walleri
Legal Department
Tanana Chiefs Conference, Inc.
122 First Avenue, Suite 600
Fairbanks, AK 99701

LAW OFFICE OF JAMES M.
HACKETT

/s/ Julie M. Gulley clerk
Julie M. Gulley

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

REPLY TO SUPPLEMENTAL OPPOSITION TO TCC'S MOTION FOR RECONSIDERATION

Ipalook has filed a Supplemental Opposition to TCC's Motion for reconsideration addressing the constitutional considerations raised by TCC's motion.[1] Essentially, Ipalook's opposition cites *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 L.Ed.1682 (1942) which held that mandatory liquidated damages under the old federal overtime wage provisions of the FLSA was constitutional. TCC does not contest that holding, nor that characterization of the holding. However, the differences between the

[1] TCC and Ipalook entered a stipulation providing for bifurcated briefing on the motion for reconsideration anticipating an extention to oppose respecting the constitutional concerns raised in TCC's motion.

former federal statute and the former state statute provide a fundamental basis to distinguish *Missel II* from applying to the former State statute.

As noted in TCC's original memorandum, both the former federal and former state wage and hour laws provided for mandatory liquidated damages in judgments for uncompensated overtime claims. However, the purposes of the two provisions are dramatically different. Under the federal system, the provision was truly for "liquidated damages", i.e. to provide compensation to employees for an amount of damages, in addition to actual lost wages, which would be otherwise difficult to determine with any degree of accuracy. *Brooklyn Savings Bank v. O'Neil*, 9 L.Ed. 1296, 1324 (1945). Thus, pre-judgment interest is not otherwise recoverable under the federal system, since these damages are compensated for by the liquidated damages. Under the State system, however, this injury is compensated for directly by award of pre-judgment interest. *Bobich v. Stewart*, 843 P.2d 1232, 1237 (Alaska, 1992). Under the State system, liquidated damages are punitive, and are paid in addition to pre-judgment interests and any compensation which may be due for incidental damages incurred by the plaintiff.

This difference is important. Since liquidated damages under the federal system an [sic] not punitive, the concerns raised by *Pacific Mut. Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1 (1991) have no relevance to the federal system.

However, the punitive nature of the Alaska scheme raised the *Hails* concerns, which are not addressed in *Missal II*.

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Defendants.

Supreme Court, U.S.
FILED
SEP 20 1999
CLERK OF THE COURT

No. 99-308

In The

Supreme Court of the United States

DENA' NENA' HENASH a/k/a
TANANA CHIEFS CONFERENCE,

Petitioner,

vs.

CATHERINE N. IPALOOK and
The STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

BRIEF IN OPPOSITION

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September 20, 1999

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QUESTIONS PRESENTED FOR REVIEW

1. Did the state trial court of first instance rule correctly under state law that TCC had waived any constitutional claim?

2. Does Ipalook's overtime claim against TCC lack national importance?

3. Is the state court decision below consistent with this Court's decisions?

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STATE STATUTES

Alaska Statutes

Sec. 23.10.110 ..... 1, 4, 7, 9, 10

Sec. 23.10.055. 5

Exemptions. The provisions of AS 23.10.050-AS 23.10.150 do not apply to

. . .

(6) an individual engaged in the activities of a nonprofit religious, charitable, cemetery, or educational organization where the employer-employee relationship does not, in fact, exist, and where services rendered to the organization are on a voluntary basis.

Sec. 23.10.140 12

Penalty. An employer who violates a provision of AS 23.10.050-23.10.150, or of any regulation or order of the commissioner issued under it, upon conviction is punishable by a fine of not less than $100 nor more than $2,000, or by imprisonment for not less than 10 nor more than 90 days, or by both. Each day a violation occurs constitutes a separate offense.

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Alaska Rules of Civil Procedure

Rule 8..... 8

General Rules of Pleading.

. . .

(c) **Affirmative Defenses**. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 16..... 6

Pretrial Conferences; Scheduling; Management.

. . .

(e) **Pretrial Orders**. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

TABLE OF AUTHORITIES – Continued

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Rule 37 8

Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

. . .

(b) **Failure to Comply With Order.**

. . .

(2) *Sanctions by Court in Which Action is Pending* . . . if a party fails to obey an order entered under Rule 16(e) . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses . . .

Rule 68 10

Rule 77 8

Motions.

. . .

(k) . . .

(2) The motion for reconsideration shall specifically state which of the grounds for reconsideration specified in the prior subparagraph exists, and shall specifically designate that portion of that ruling, the memorandum, or the record, or that particular authority, which the movant wishes the court to consider. The motion for reconsideration and supporting memorandum shall not exceed five pages.

JURISDICTION

The judgment of the state court of first instance rests on a state-law ground that is both independent of the merits of the federal due process constitutional claim and an adequate basis for the decision of the state court of first instance.

STATUTES INVOLVED IN THIS CASE

Alaska Statutes

Current Law

> **Sec. 23.10.110. Remedies of employee; attorney fees; offers of judgment; settlement; waiver.** (a) an employer who violates a provision of AS 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and, except as provided in (d) of this section, in an additional equal amount as liquidated damages.
>
> (b) An action to recover from the employer the wages and damages for which the employer is liable may be maintained in a competent court by an employee personally and for other employees similarly situated, or an employee may individually designate in writing an agent or representative to maintain an action for the employee. The consent shall be filed in the court in which the action is brought. At the request of a person paid less than the amount to which the person is entitled under AS 23.10.050 – 23.10.150, the commissioner may take an assignment in trust for the employee of the full

amount to which the employee is entitled under this section and may bring any legal action necessary to collect the claim.

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and, except as provided in (e)-(h) of this section, reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action.

(d) In an action under (a) of this section to recover unpaid overtime compensation or liquidated damages for unpaid overtime, if the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060, the court may decline to award liquidated damages or may award an amount of liquidated damages less than the amount set out in (a) of this section.

(e) If the plaintiff prevails in an action for unpaid overtime compensation under (a) of this section, the court shall award reasonable attorney fees to the plaintiff unless the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or

omission was not in violation of AS 23.10.060, in which case

(1) the court may award attorney fees to the plaintiff in accordance with court rules; or

(2) If the defendant would be entitled to attorney fees if the action were subject to the standards under court rule offers of judgment, the court may not award attorney fees to either the plaintiff or the defendant.

(f) If the defendant prevails in an action for unpaid overtime compensation under (a) of this section and had previously made an offer of judgment to the plaintiff, the court shall award attorney fees to the defendant unless the plaintiff proves to the satisfaction to the court that the action was both brought and prosecuted in good faith and that the plaintiff had reasonable grounds for believing that the act or omission was in violation of AS 23.10.060. If the court awards attorney fees to the defendant, the award shall be made in accordance with court rule.

(g) Failure to inquire into Alaska law is not consistent with a claim of good faith under this subsection.

(h) Subsections (d)-(g) of this section do not apply to an action brought under this section by the commissioner.

(i) The commissioner may supervise the payment of the unpaid overtime compensation owing to an employee under AS 23.10.060. Payment in full in accordance with an agreement by an employee to settle a claim for unpaid overtime compensation or liquidated damages for unpaid overtime compensation constitutes a

waiver of any right as to this claim the employee may have under (a) of this section to unpaid overtime compensation or liquidated damages for unpaid overtime compensation.

(j) In a settlement for unpaid overtime compensation that is not supervised by the department or the court, an employee is entitled to liquidated damages under (a) of this section unless the employee and the employer enter into a written settlement agreement in which the employee expressly waives the right to receive liquidated damages. A private written settlement agreement under this subsection is not valid unless submitted to the department for review. The department shall review the agreement and approve it if it is fair to the parties. The department shall approve or deny an agreement within 30 days of receipt. A waiver of liquidated damages may not be a condition of employment.

(Amended by Laws 1995, c. 37, §§ 1 to 3, eff. Aug. 22, 1995.)

Before the 1995 Amendments

Sec. 23.10.110. Remedies of employee. (a) An employer who violates a provision of AS 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

(b) An action to recover from the employer the wages and damages for which the employer is liable may be maintained in a competent court by an employee personally and for other employees similarly situated, or an employee

may individually designate in writing an agent or representative to maintain an action for the employee. The consent shall be filed in the court in which the action is brought. At the request of a person paid less than the amount to which the person is entitled under AS 23.10.050 – 23.10.150, the commissioner may take an assignment in trust for the employee of the full amount to which the employee is entitled under this section and may bring any legal action necessary to collect the claim.

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action. (§ 9(2) ch 171 SLA 1959)

STATEMENT OF THE CASE

In 1995 Respondent Catherine Ipalook ("Ipalook") filed a wage and hour complaint under the Alaska Wage and Hour Act ("AWHA") against her former employer Petitioner Tanana Chiefs Conference, Inc., a state of Alaska non-profit corporation ("TCC")[1]. Resp. App. 1-4.

[1] AWHA applies to a non-profit Alaskan corporation like TCC. AS 23.10.055(6).

Ipalook's suit claimed unpaid overtime under AWHA ("AWHA") provisions in place before AWHA amendments which took effect on August 22, 1995. Pet. App. 44.

TCC raised an affirmative defense of good faith in its original answer; in response to Ipalook's motion to strike, TCC withdrew its good faith defense. Resp. App. 5.

TCC filed counterclaims against Ipalook in its later amended answer, claiming Ipalook breached duties as a former President of TCC. Pet. App. 39-41; 44-46; Resp. App. 14-20. TCC included no defense or claim of good faith or unconstitutionality in its amended answer. Resp. App. 14-20. Ipalook filed a third-party complaint. Resp. App. 21-24. Ipalook who replied to TCC's counterclaims. Resp. App. 25-30.

The state trial court filed a civil pretrial order under Ak. R. Civ. P. 16(e). Resp. App. 6-12. TCC filed a pretrial brief. Resp. App. 33-44. TCC's pretrial brief included no defense or claim of good faith or unconstitutionality. Resp. App. 33-44.

Following trial, Ipalook prevailed on her overtime claim. Pet. App. 44. Ipalook also prevailed on her third-party claim. Pet. App. 45-46. TCC's counterclaims against Ipalook failed. Pet. App. 39-41; 44-46.

At a hearing following trial but before entry of judgment, the state trial court ruled that TCC had not timely raised, and thus waived, any constitutional issue. Resp. App. 67-68. The state trial court also clarified that its finding of statutory good faith was not a finding of good faith under amended AWHA provisions taking effect on August 22, 1995. Resp. App. 69-70.

TCC appealed the judgment to the Alaska Supreme Court; Ipalook cross-appealed. TCC lost its appeal; Ipalook prevailed on her cross-appeal. Pet. App. 1-23.

Ipalook's case is presently remanded back to the trial court, pursuant to the mandate of the Alaska Supreme Court. Pet. App. 23.

ARGUMENTS FOR DENYING THE PETITION

A. Summary

First, the waiver ruling by the state court of first instance is an adequate and independent ground, based on state law, to affirm the state decision. Second, the issue is not sufficiently important to warrant this Court's attention. Third, this Court's own prior decisions are controlling.

B. Arguments

1. The Federal Due Process Question Presented By Petitioner TCC Was Not Timely Raised Or Preserved Under State Law In The State Court Of First Instance

During final arguments on April 4, 1997, TCC raised a "reverse relation back" AWHA statutory argument based upon amended AS 23.10.110. Resp. App. 45-49. The trial court ruled that TCC could file a motion for reconsideration on that specific issue. Resp. App. 48-49. On

April 28, 1997 TCC filed an overlength pleading[2] which included a due process constitutional argument. Resp. App. 50-60. Ipalook opposed that portion of TCC's pleading, arguing that a constitutional claim had not been raised in TCC's pleadings, nor at trial, and was untimely and waived. Resp. App. 61-66. On May 20, 1997 the state trial court ruled that TCC's constitutional claim was untimely and waived. Resp. App. 67-68. The state court's ruling was firmly based upon state law. A. R. Civ. P. 8(c); 16(e); 37(b)(2)(B).

2. Ipalook's Overtime Claim Against TCC Under Former State Law Lacks National Importance

Ipalook's overtime claim against TCC, arising under the AWHA, lacks national importance. TCC's unsuccessful counterclaims against Ipalook, as a former President of TCC, and Ipalook's third-party complaint, highlight the local and factual nature of the disputes between Ipalook and TCC. The only real questions TCC raises in its Petition turn on the particular facts of the case alone and are of interest only to the parties to it.

The factual issues have already been resolved twice in Ipalook's favor, without any impact outside the limits of the case itself. The court should decline TCC's petition because of the lack of national importance arising out of Ipalook's state overtime claim against TCC and TCC's unsuccessful counterclaims against Ipalook.

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[2] A.R.Civ.P. 77(k)(2) limits a motion for reconsideration to five pages. TCC's motion for reconsideration was twice that length. Resp. App. 50-60.

3. The State Court Decision Adopted A Long-Respected Doctrine In Considering The Issue Below

After trial but before entry of judgment in the state court of first instance, Ipalook also filed a contingent opposition to TCC's due process constitutional claim. Pet. App. 62-65. Ipalook cited and relied upon *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 L.Ed. 1682 (1942) (*"Missel"*)[3] for the proposition that mandatory exaction of liquidated damages for violation of wage and hour provisions is not violative of due process of law. Pet. App. 62. In reply TCC referenced the holding in *Missel* as follows:

> TCC does not contest that holding, nor that characterization of the holding. Pet. App. 66.

The Alaska Supreme Court expressly cites to *Missel* in upholding former AS 23.10.110(a):

> We . . . hold, as the Supreme Court did in *Missel*, that the mandatory award of liquidated damages does not violate due process. Pet. App. 12.

Prior to the 1995 amendment to AS 23.10.110, Alaskan courts awarded mandatory liquidated damages to claimants who prevailed in their claim for overtime wages. *Alaska Int'l Industries v. Musarra*, 602 P.2d 1240 (Alaska 1979) and *McKeown v. Kinney Shoe Corp.*, 820 P.2d 1068 (Alaska 1991).

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[3] The *Missel* court cited and referred to *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 9 S.Ct. 207, 32 L.Ed. 585 (1889); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 6 S.Ct. 110, 29 L.Ed. 463 (1885), and *Kansas City Southern R. Co. v. Anderson*, 233 U.S. 523, 34 S.Ct. 599, 58 L.Ed. 983 (1914).

TCC claims incorrectly that "Alaska has a (sic) unique wage and hour law".[4] Petition, 5. Former AS 23.10.110(a) is not unique. Besides Alaska, other state courts have enforced applicable mandatory liquidated damages provisions requiring employers to pay a penalty in the amount equal to the employee's unpaid, outstanding overtime compensation and other wages. See *Rosebud County v. Roan*, 627 P.2d 1222, 1228 (Montana 1981) ["(t)his statute leaves no discretion to determine whether the employer was in good faith, because even if the employer was in good faith, the finding of a violation requires imposition of the penalty"]; *Purdy v. Community Telecommunications*, 663 A.2d 25, 29 (Maine 1995) [holding that under state statute the employee was entitled to additional amount equal to twice the amount of unpaid wages plus interest, reasonable attorney fees, and costs]; *Cooper v. Springfield Terminal Railway*, 635 A.2d 952, 955 (Maine 1993) [holding that employer's violation of state wage statute entitled the employee to unpaid wages, liquidated damages, costs and attorney's fees]; *Gilbert v. Moore*, 697 P.2d 1179, 1183 (Idaho 1985) [holding that an award of statutory mandatory damages three (3) times the amount of actual unpaid recoverable wages does not first require a showing of bad faith on the part of the

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[4] TCC also claims that the state trial court "applied a penal interest rate of 15.5%" for TCC's failure to accept Ipalook's settlement offer. Petition, p.7 n.5. The court properly applied provisions of former AS 09.30.065, Alaska's offer of judgment statute, and A.R. Civ. P. 68., Alaska's offer of judgment rule. Resp. App. 69. *See Home Indem. Co. v. Lane Powell Moss and Muller*, 43 F.3d 1322, 1332 (9th Cir. 1995). TCC has never contested former AS 09.30.065 or A.R. Civ. P. 68.

employer]; *Stampco Construction Co. v. Guffey*, 572 N.E.2d 510 (Indiana App. 1991) [holding that worker who was not paid prevailing wage for work on public works project was entitled to recover three (3) times the wages due under state statute]; *Fardy v. Physicians Health Rehab. Svcs., Inc.*, 529 N.E.2d 879, 882-883 (Indiana App. 1988) [holding that the employee was entitled to total award of three (3) times the wages due plus an award of reasonable attorney fees under state statute].[5]

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[5] *Hale v. Morgan*, 584 P.2d 512 (Calif. 1978) ("*Hale*") is legally and factually distinguishable. *Hale* does not involve mandatory liquidated damages under a state wage and hour statute. *Hale* was later distinguished in its own state jurisdiction on factual grounds in *Kinney v. Vaccari*, 612 P.2d 877, 878, 882 (Calif. 1980).

CONCLUSION

The Court should deny TCC's petition for writ of certiorari[6].

Respectfully submitted,

JAMES M. HACKETT
Counsel of Record for Respondent
Catherine N. Ipalook
JAMES M. HACKETT, INC.
ATTORNEY AT LAW
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-3626

September 20, 1999

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[6] TCC incorrectly contends that under AS 23.10.140, its maximum potential criminal fine for failing to pay overtime wages would be no more than $2000; and thus a liquidated damage award greater than $2000 is excessive when compared to the maximum fine of $2000. Petition 8 n. 6. TCC ignores that AS 23.10.140 provides that "(e)ach day a violation occurs constitutes a separate offense." Therefore, TCC could be fined a maximum of up to $2000 per day for each day TCC was in violation during Ipalook's employment between June 19, 1994 and August 18, 1995. Pet. App. 26. TCC's maximum potential criminal fine under AS 23.10.140 for this period is in the approximate range of $600,000 to $700,000.

RESPONDENT'S APPENDIX

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TCC's Amended Answer and Counterclaims (7/17/96) .....Resp. App. 14

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Ipalook's Affirmative Defenses and Amended Reply to TCC's Counterclaims (8/29/96)..... Resp. App. 25

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TCC's Trial Brief (3/13/97) .....Resp. App. 33

Portion of TCC's final trial argument and state trial court's leave to file motion for reconsideration (4/4/97).....Resp. App. 45

TCC's Motion to Reconsider Application of Mandatory Liquidated Damages (4/28/97) .....Resp. App. 50

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Tanana Chiefs Conference, Inc.
Articles of Incorporation
By-Laws

* * *

Dena' Nena' Henash

1996 Version

ARTICLES OF AMENDMENT

to the

ARTICLES OF INCORPORATION

of

DENA' NENA' HENASH
(Tanana Chiefs Conference, Inc.)

Pursuant to the provisions of the Alaska Non-Profit Corporations Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

FIRST: The name of the corporation is DENA' NENA' HENASH, (Tanana Chiefs Conference, Inc.)

SECOND: The following amendment of the Articles of Incorporation was adopted by the Board of Directors and Members of the corporation on October 20, 1975, in the manner prescribed by the Alaska Non-Profit Corporation Act:

AMENDMENT

EIGHTH: No part of the net earnings of the corporation shall inure to the benefit of, or be distributed to, its members, trustees, officers,

or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article Three hereof. Notwithstanding any other provision of these articles, this corporation shall not except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the purposes of this corporation.

THIRD: The following statements comply with Alaska Statutes Section 10.20.181.

All members of the Board of Directors and all Members of the Corporation are entitled to vote on all Amendments to the Articles of Incorporation.

On the date of October 20, 1975, the above listed Amendment was adopted by a quorum of Board of Directors and Members of the Corporation. The above listed Amendment received 100% of the votes cast of the Board of Directors and Members of the Corporation present at this meeting.

DATED: October 20, 1975. DENA' NENA' HENASH
(Tanana Chiefs Conference, Inc.)

By: /s/ Melvin Charlie
(its President)
Melvin Charlie

and

/s/ Flora Bergman
[Illegible]

State of Alaska

[Seal]

Department of Commerce and Economic Development

Certificate

The undersigned, as Commissioner of Commerce and Economic Development of the State of Alaska, hereby certifies that duplicate originals of Articles of Amendment to the Articles of Incorporation of DENA' NENA' HEMASH

duly signed and verified pursuant to the provisions of the Alaska Nonprofit Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as Commissioner of Commerce and Economic Development, and by virtue of the authority invested in him by law, hereby issues this Certificate of Amendment to the Articles of Incorporation of

DENA' NENA' HENASH

and attaches hereto a duplicate original of the Articles of Amendment.

[Seal]

IN TESTIMONY WHEREOF, I have hereunto set my hand affixed my official seal, at Juneau, the Capitol, this 23rd *day of* April *A.D. 1979*

/s/ Charles R. Webber
CHARLES R. WEBBER
COMMISSIONER OF
COMMERCE AND
ECONOMIC
DEVELOPMENT

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
Fourth Judicial District at Fairbanks

CATHERINE N. IPALOOK,

Plaintiff,

v.

DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE,

Defendant.

_____/

Case No. 4FA-95-2745 Civ

WITHDRAWAL OF CERTAIN DEFENSES AND PARTIAL NONOPPOSITION TO MOTION TO [STRIKE]

(Filed Mar. 12, 1996)

Tanana Chiefs Conference, Inc., responds to the plaintiff's motion to strike, served January 17, 1996.

Tanana Chiefs Conference withdraws the following two affirmative defenses which appear in its Answer: #3, relating to good faith compliance with the Alaska wage and hour laws; and #6, relating to an offset for the value of room and board provided to plaintiff.

Tanana Chiefs Conference seeks to reserve the right to move to amend its pleadings, as provided by pretrial order, to raise additional defenses if warranted by case law or statute.

An appropriate order accompanies this pleading.

Dated: March 11, 1996.

TANANA CHIEFS CONFERENCE, INC.

/s/ Mark Andrews

MARK ANDREWS
Associate Counsel

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE,
Defendant.

Case No. 4FA-95-2745 Civil

CIVIL PRETRIAL ORDER

(Filed Mar. 15, 1996)

TRIAL. This matter is set for a COURT trial on the week of: 120996. Trial is estimated to take (6) days. TRIAL TIME 8:15 AM – 1:15 PM.

1. ***DUE DATES.***

Disclosure Civil R. 26(1):	040496
Joinder of Parties:	061296
Amendment to Pleadings:	061296
Dispositive Motions:	091096
Expert Witnesses:	
Disclosure:	090396
List:	111296
Other Witnesses:	
Disclosure:	090396
List	111296

Settlement Conference:	102596
Other Motions:	111296
Close of Discovery:	111296
Exhibits:	112596
Pretrial Memoranda:	112196
Jury Instructions:	n/a
Pretrial Conference:	112996 at 2:30 p.m.
Objections to Depositions:	112596
Objections to Instructions:	n/a
Reply to Objections to Depositions:	112796

2. *INITIAL DISCLOSURE.*

Unless previously made, on or before the date set forth in paragraph 1, the [parties] shall comply with Civil R. 26(1).

3. *EXPERT WITNESSES.*

(a) *Disclosure.* On or before the date set forth in paragraph 1, the parties shall comply with Civil R. 26(2).

(b) *Expert Witness Lists.* On or before the date set forth in paragraph 1 the parties shall file and serve a list of expert witnesses showing the names, current mailing addresses, physical addresses, telephone numbers, and area of expertise of expert witnesses which the party actually intends to call at the trial.

4. ***OTHER WITNESSES.***

(a) *Disclosure.* On or before the date set forth in paragraph 1, the parties shall comply with Civil R. 26(3).

(b) *Other Witness Lists.* On or before the date set forth in paragraph 1, the parties shall file and serve a list of witnesses showing the names, current mailing and physical addresses, and telephone numbers of all witnesses other than expert witnesses which the party actually intends to call at the trial.

5. ***DISCOVERY.*** Shall be pursuant to Civil R. 26 and shall be completed by the date set forth in paragraph 1.

Limits on Discovery: No change from Rule.

6. ***EXHIBITS.*** Exhibits will be handled pursuant to Administrative Bulletin No. 9, Civil R. 43.1, and as follows:

(a) Parties shall exchange exhibits on or before the date set forth in paragraph 1.

(b) An original and one copy of the exhibit list shall be filed with the court the first day of trial.

7. ***JOINDER OF PARTIES.*** On or before the date set forth in paragraph 1, motions to join other parties must be filed.

8. ***AMENDMENTS TO PLEADINGS.*** On or before the date set forth in paragraph 1, motions to amend pleadings must be filed.

9. ***PRETRIAL MEMORANDA***. On or before the date set forth in paragraph 1, the parties shall file and serve a pretrial memorandum covering the following matters:

(a) *Trial Brief.* This shall contain the following:

(1) A short, plain and candid statement of each contested issue of fact which remains to be litigated.

(2) A short, plain and candid statement of each contested issue of law which remains to be litigated.

(3) A short, plain and candid statement of the facts of the case.

(4) A legal brief supporting the party's position as to each contested issue of law stated in paragraph (2) above, and each question of law or evidence which the party should reasonably anticipate may arise during the course of the trial.

(b) *Objections to Documents and Exhibits.*

(1) The objection shall identify the document or exhibit by the exhibit number or letter; and

(2) Shall set forth a clear statement of the objection, together with a citation to the Alaska Rule of Evidence relied on and citation of authority.

(3) Documents and exhibits to which no objection is made shall be admitted at trial.

(c) *Stipulations.* The parties shall specify those relevant facts admitted in pleadings,

requests for admissions or other records on file for which no proof need be offered at trial.

(d) *Depositions.* For each witness whose testimony is to be presented by deposition, the proponent of the testimony shall specifically designate those portions which are proposed to be read or shown, by page and line. Objections and counter designations are to be filed, as set forth in paragraph 14.

10. ***JURY INSTRUCTIONS.*** If the trial is a jury trial, the parties shall file and serve proposed instructions on or before the date set forth in paragraph 1. The parties need not file standard instructions. *IF A PARTY FAILS TO SUBMIT JURY INSTRUCTIONS IN COMPLIANCE WITH THIS ORDER, THE COURT MAY IMPOSE APPROPRIATE SANCTIONS AGAINST THAT PARTY, INCLUDING THE AWARD OF ATTORNEY'S FEES, FINES, THE PRECLUSION OF EVIDENCE, OR THE DENIAL OF A JURY TRIAL.*

The parties are to submit two sets of instructions with citations to appropriate authority on each. Each proposed instruction must be consecutively numbered, with a heading denoting the party proposing the instruction and its number.

11. ***OBJECTIONS TO INSTRUCTIONS.*** On or before the date set forth in paragraph 1, any objections to proposed jury instructions shall be filed.

(a) Each objection to a tendered instruction shall identify the instruction by proponent and its number and shall set forth separately and specifically a clear statement of any objection.

(b) following the objection there shall be listed a citation of authorities in support thereof.

(c) Instructions to which no objection is made shall be used at trial unless insufficient evidence is produced to support the instructions.

12. ***MOTIONS.*** -

(a) *Dispositive Motions.* Shall be filed on or before the date set forth in paragraph 1.

(b) *Other Motions.* Including motions *in limine* and motions for protective orders, shall be filed on or before the date set forth in paragraph 1.

(c) *Procedure.* The provisions of Civil Rule 77 shall govern the filing of any motion filed under this paragraph.

13. ***SETTLEMENT CONFERENCE.*** Any motion for a settlement conference shall be filed on or before the date specified in paragraph 1. Any stipulation for settlement conference shall be filed no later that 21 days after the state specified in paragraph 1 for filing a settlement conference motion. The parties shall specify whether they request the settlement conference be before the assigned trial judge or another judge.

The procedure for the settlement conference shall be determined by the settlement conference judge.

14 ***DEPOSITIONS.*** Trial use of depositions shall be governed by Civil Rule 32. Objections to the use of any deposition shall be filed on or before the date specified in

paragraph 1 and be in conformity with Civil R. 26(3). Replies to the objections or counter designations shall be filed on or before the date set forth in paragraph 1.

15. ***PRETRIAL CONFERENCE.*** A pretrial conference shall be held on the date and time set forth in paragraph 1.

16. ***SERVICE OF FILINGS.*** Pretrial Memoranda, Objections and Reply to Objections to Depositions, Jury Instructions, Objections to Instructions and Exhibits must be served in a manner which will allow receipt by all parties by the date of filing set forth in paragraph 1.

17. ***OTHER.***

IT IS HEREBY ORDERED that this order shall govern the conduct of pretrial and trial of this case and that it shall not be amended except by order of the court to prevent manifest injustice.

DATED this 15 day of March, 1996, at Fairbanks, Alaska.

/s/ Jay Hodges
JAY HODGES
Superior Court Judge

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENÁ NENÁ HENASH, a/k/a
TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

ORDER GRANTING LEAVE TO FILE AMENDED ANSWER

(Filed Jul. 17, 1996)

WHEREAS, the Plaintiff having filed a motion for leave to amend its answer in the above captioned cause, and the Court being aprised of the premises therein,

IT IS HEREBY ORDERED that leave to file TCC's amended answer in the above captioned case is here GRANTED.

DATE: 7/17/96

/s/ [Illegible]
JUDGE

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,	)
Plaintiff,	)
vs.	)
DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC.	)
Defendant.	)

Case No. 4 FA-95-2745

AMENDED ANSWER

(Filed Jul. 17, 1996)

The Defendant, Tanana Chiefs Conference, Inc., answers the paragraphs of the complaint as follows:

COUNT I

1. Admit that Catherine N. Ipalook was employed by TCC from June 1994 to August 1995. "All times pertinent" is a statement of law to which no answer is required.

2. Deny; plaintiff's employment as Patient Hostel Manager at TCC might have begun on June 20, 1994, not June 13, 1994.

3. Admit the rate of compensation, but deny any inference that plaintiff was an hourly wage employee;

state further that there are some other benefits to the position besides housing.

4. Deny; plaintiff's employment at Tanana Chiefs Conference ended August 18, 1995, not August 19, 1995.

5. Defendant is without knowledge or information sufficient to admit or deny the statements of this paragraph, and thus this paragraph is denied.

6. Defendant is without knowledge or information sufficient to admit or deny the factual statements of this paragraph, and thus this paragraph is denied. The claim that plaintiff is entitled to additional compensation is a statement of law to which no answer is required; to the extent that an answer is required, this paragraph is denied.

7. This paragraph is a statement of law, to which no answer is required. To the extent an answer is required, this paragraph is denied.

COUNT II

8. TCC responds to this paragraph as stated in earlier paragraphs.

9. Admit that TCC failed to pay Ipalook her accrued personal leave within three days of her leaving TCC, but state further that TCC otherwise paid timely all that it owed to Ipalook upon her departure. Deny further that any penalty is owed to plaintiff. This paragraph is otherwise denied, or is a statement of law to which no answer is required.

10. This paragraph is a demand, and states no facts. To the extent that it is a statement of law, no answer is required; to the extent that it states facts, this paragraph is denied.

Any statement not admitted is denied. The defendant prays that the plaintiff take nothing by her complaint.

DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.

2. Plaintiff's employment was exempt from the pertinent wage and hour laws of the State of Alaska. These exemptions include, but might be not limited to, the following: plaintiff was a supervisory, executive, or administrative employee; plaintiff was the employee of a hospital whose employment included the provisions of medical services.

3. Plaintiff's claim is barred by estoppel, in that the Plaintiff, in her prior position as President of Tanana Chiefs Conference, Inc., a corporate officer of the Defendant, between March 1990 and March 1991, operated the TCC Patient Hostel in the same manner as provided during her tenure as Hostel Manager, including the conditions of employment for the Hostel Manager, and by her actions or inaction in the former capacity, gave cause to the conditions of her later employment.

4. Plaintiff has failed to mitigate her damages, if any.

5. Other defenses as may be developed by discovery.

ALTERNATIVE COUNTERCLAIM NO. 1
(Breach of Fiduciary Duty)

1) Catherine Ipalook, Plaintiff in the above captioned proceeding, was the President of Tanana Chiefs Conference, Inc. between March 1990 and March 1991, and served as the Chief Executive Officer of TCC during this period.

2) The president of Tanana Chiefs Conference, Inc. is an officer of the corporation owing a fiduciary duty to the corporation to exercise reasonable care in the conduct of TCC business.

3) While the President of Tanana Chiefs Conference Inc., Ms. Ipalook, Tanana Chiefs Conference, between March 1990 and March 1991, TCC operated the TCC Patient Hostel and the Paul Williams House, a residential mental health facility.

4) While Plaintiff was the President of Tanana Chiefs Conference between March 1990 and March 1991, TCC maintained a position of manager of the Paul Williams House and the position of manager of the TCC Patient Hostel as salaried positions exempt as to the payment of overtime.

5) While Plaintiff was the President of Tanana Chiefs Conference between March 1990 and March 1991, Plaintiff did not take any steps to reclassify the manager positions for the Paul Williams House and TCC Patient Hostel from exempt to non-exempt positions.

6) The failure to act as indicated in the above paragraph was unreasonable and exposed TCC to liability in violation of the Plaintiffs duty of care as an officer of TCC.

7) As a result of Plaintiff's conduct stated herein, TCC sustained damages in an amount equal to any valid claim that the Plaintiff may be awarded in the above captioned matter.

8) As a result of Plaintiff's conduct stated herein, TCC sustained damages in an amount equal to any valid claim that the third parties may be awarded in any subsequent matters.

ALTERNATIVE COUNTERCLAIM NO. 2
(Breach of Duty to Disclose)

9) Incorporate by reference the allegations contained in paragraphs' 1-8 of the Counterclaims stated above.

10) That during Ms. Ipalook's employment as the Patient Hostel Manager, Ms. Ipalook, as a former president of Tanana Chiefs Conference, Inc., had a continuing duty to timely disclose any information which she believed could incur liability to TCC arising out of any affirmative actions or act of omission as President.

11) Ms. Ipalook did not disclose to TCC that she considered the Patient Hostel Manager to be a non-exempt position.

12) The failure of Ms. Ipalook to disclose information creating liability to TCC caused damages to TCC in an amount to be determined at trial.

ALTERNATIVE COUNTERCLAIM NO. 3
(Retained Records: Violation of Privacy Act, Fraud Upon Employer, and Violation of Employee Duty.)

13) Incorporate by reference the allegations contained in paragraphs' 1-12 of the Counterclaims stated above.

14) That as Patient Hostel Manager, Ms. Catherine Ipalook converted TCC files to her personal possession for such uses currently unknown to TCC.

15) Such files are confidential patient files of beneficiaries of the U.S. Indian Health Service, subject to the confidentiality provisions of the Federal Privacy Act, [5 USC § 552a].

16) Upon her termination from TCC, Ms. Ipalook signed a statement stating that she had returned all files to TCC, which constitutes a fraud upon TCC, her employer.

17) The retaining of such records violates the Federal Privacy Act.

18) The retaining of such records violates TCC personnel manual, and thus a condition of employment and the employee's duty of the fidelity to TCC.

19) Such actions stated above, created lability for TCC to IHS beneficiaries and damages in an amount to be determined at trial.

WHEREFORE, TCC requests dismissal of the Claims against TCC, and demands judgment on the Counterclaims against Catherine Ipalook in an amount equal to

the damages proven at trial, and injunctive relief against Ms. Ipalook to return all copies of retained documents.

Dated: JUNE 12, 1996.

MICHAEL J. WALLERI

/s/ Michael J. Walleri
General Counsel
TANANA CHIEFS CONFERENCE
ABA #7906060

Certificate of Service

I hereby certify that a copy of this Answer was sent by courier to James Hackett, Esq., this 12th day of June, 1996.

/s/ Trudy Oyen
Trudy Oyen

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-8626

IN THE SUPERIOR COURT FOR

THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,

Third Party-Plaintiff,

vs.

MR. WILL MAYO, President, Tanana Chiefs Conference, Inc.; MS. KATHERINE A. STRLE, Personnel Officer, Tanana Chiefs Conference, Inc.; AND JOHN DOES, 1-3,

Third Party-Defendants.

Case No. 4FA-95-2745 Civil

THIRD-PARTY PLAINTIFF CATHERINE N. IPALOOK'S THIRD-PARTY COMPLAINT

(Filed Aug. 12, 1996)

COMES NOW Third-party Plaintiff Catherine N. Ipalook ("Ipalook"), by and through counsel, and pursuant to Civil Rule 14(b), files the following third-party complaint against the following Defendants/Third Party Defendants in response to Defendant TCC's counterclaims nos. 1 and 2:

Count 1
Will Mayo as TCC President

1. Defendant/Third Party Will Mayo ("Mayo") has been President of Defendant Tanana Chiefs Conference, Inc. ("TCC") since March 1993 to present.

2. Mayo was President of TCC during the time Ipalook was employed by TCC as a Patient Hostel employee.

3. To the extent that TCC's counterclaim no. 1 (breach of fiduciary duty) and counterclaim no. 2 (breach of duty to disclose) states a cause or causes action, and (her) have any merit, Ipalook alleges that Mayo is a proper indispensable party to those asserted counterclaims.

4. There is an actual case or controversy, between Ipalook and TCC concerning whether TCC's counterclaims nos. 1 and 2 against Plaintiff have merit given the fact that several years elapsed between the time that Ipalook was a President of TCC and the time she was later employed as a Patient Hostel employee, and/or whether all indispensable parties have been named and identified by TCC regarding such counterclaims.

5. Ipalook requests indemnification and contribution from Mayo, to the full extent that TCC's counterclaims no. 1 and no. 2 has (have) merit, if any.

Count 2
Kathryn Strle as TCC Personnel Manager

6. Ipalook incorporates herein by reference Paragraphs nos. 1-4 set forth above.

7. Defendant/Third Party Kathryn Strle ("Strle") as been personnel officer/payroll supervisor at TCC since September 1993 to present.

8. Strle was TCC's personnel officer during the time Ipalook was employed by TCC as a Patient Hostel employee.

9. Part of Strle's responsibilities have included TCC personnel functions.

10. To the extent that TCC's counterclaim no. 1 (breach of fiduciary duty) and counterclaim no. 2 (breach of duty to disclose) state a cause or causes of action, and (has) have any merit, Ipalook alleges that Strle is a proper indispensable party to those asserted counterclaims.

11. Ipalook requests indemnification and contribution from Strle, jointly and severally with Mayo, to the full extent that TCC's counterclaims nos. 1 and 2 (has) have merit, if any.

Count 3
John Does 1-3

12. Ipalook incorporates by reference Paragraphs nos. 1-10 set forth above.

13. To the extent that other TCC employees or supervisors, herein denominated as John Does, 1-3, (was) were responsible for properly classifying TCC's employment positions under the Alaska Wage and Hour Act ("AWHA") during the time of Ipalook's employment as a Patient Hostel employee with TCC, Ipalook requests indemnification and contribution, jointly and severally, together with Will Mayo and Kathryn Strle, from such

John Does 1-3, to the full extent that TCC's counterclaims nos. 1 and 2 (has) have merit, if any.

WHEREFORE Third-Party Plaintiff Ipalook prays for an appropriate judgment, including an appropriate declaratory judgment or judgments, whether or not TCC's counterclaims nos. 1 and 2 are legally sufficient and have identified all indispensable persons thereto; Ipalook further prays for full indemnification and contribution from all responsible Third-Party Defendants as to TCC's counterclaims nos. 1 and 2 to the extent such counterclaims have any merit; and further prays for reasonable costs and attorney's fees.

DATED at Fairbanks, Alaska this 8 day of August, 1996.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James M. Hackett
ATTORNEY FOR
THIRD-PARTY PLAINTIFF

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-3626

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH
a/k/a TANANA CHIEFS
CONFERENCE,
Defendant.

Case No. 4FA-95-2745 Civil

PLAINTIFF'S AFFIRMATIVE DEFENSES AND AMENDED REPLY TO DEFENDANT'S COUNTERCLAIMS

(Filed Aug. 29, 1996)

COMES NOW, Plaintiff Catherine N. Ipalook, by and through counsel and files the following affirmative defenses and replies to Defendant's denominated alternative counterclaims as follows:

Affirmative Defenses

1. One or more or all of Defendant's denominated alternative counterclaims fails to state a claim upon which relief can be granted.

2. One or more or all of Defendant's denominated alternative counterclaims fall outside the jurisdiction of the state judiciary.

3. One or more or all of Defendant's denominated alternative counterclaims are(is) untimely compulsory counterclaims barred by applicable statute(s) of limitations.

4. One or more or all of Defendant's denominated alternative counterclaims constitute compulsory counterclaims which should have been included in Defendant's original pleading, and are(is) waived by having failed to be so included.

5. One or more or all of Defendant's denominated alternative counterclaims fail(s) because of failure of alleged affected persons to exhaust available administrative remedies.

6. Defendant has failed to join one or more indispensable parties, including but not limited to past and present TCC President Will Mayo, past and present Personnel Directors, past and present health department supervisors, and past and present inhouse TCC attorneys.

7. Defendant has failed to allege the circumstances constituting alleged fraud with particularity.

8. Defendant has failed to specifically state items of special damage(s), and has otherwise claimed speculative damages.

9. One or more or all of Defendant's counterclaims fails because of the doctrines of estoppel, and/or waiver, and/or superseding intervening cause or causes.

10. Defendant TCC lacks the standing and/or the capacity to bring one or more or all of Defendant TCC's asserted counterclaims.

11. Plaintiff Ipalook has an absolute litigation privilege, or an applicable conditional litigation privilege, which defeats one or more or all of Defendant TCC's asserted counterclaims.

Reply To Alternative Counterclaim No. 1

1. Plaintiff admits Paragraph no. 1;

2. Plaintiff admits that as President she owed a fiduciary duty to the corporation. Plaintiff states that she discharged that duty. Plaintiff otherwise denies Paragraph no. 2;

3. Plaintiff denies that she as President "operated" the TCC Patient Hostel. Plaintiff admits that the corporation operated entities known as the TCC Patient Hostel and the Paul Williams House during the time she was President. Plaintiff otherwise denies Paragraph no. 4;

4. Plaintiff denies Paragraph no. 4 based upon lack of knowledge;

5. Plaintiff admits she undertook no specific personnel actions while President, because personnel actions did not come before the Executive Board while she was President. Plaintiff otherwise denies Paragraph no. 5 based upon lack of information;

6. Plaintiff denies Paragraph no. 6;

7. Plaintiff denies Paragraph no. 7, which is in any event a legal argument not calling for any specific response from Plaintiff;

8. Plaintiff denies Paragraph no. 8, which is in any event a legal argument not calling for any specific response from Plaintiff;

Reply To Alternative Counterclaim No. 2

9. Plaintiff incorporates her answers to Paragraphs 1-8 above herein;

10. Plaintiff denies Paragraph no. 10, which Paragraph is in reality in any event a legal argument which calls for no specific response from Plaintiff. Further, such paragraph is premised upon a false assumption, namely that any liability by Defendant corporation for Plaintiff's later employment as TCC Patient Hostel Manager somehow arose "out of any affirmative actions or act of omission" by Plaintiff as President some years previously;

11. Plaintiff admits she undertook no specific personnel actions while President, because personnel actions did not come before the Executive Board while she was President. Plaintiff otherwise denies Paragraph no. 11 as based upon a fact of which she has(had) no knowledge or information;

12. Plaintiff denies Paragraph no. 12, which in reality in any event is a legal argument which requires no specific response from Plaintiff;

Reply To Alternative Counterclaim No. 3

13. Plaintiff incorporates her answers to Paragraphs 1-12 herein by reference;

14. Plaintiff admits she copied some whited-out documents, none of which documents constituted "TCC files", for litigation purposes, which documents have, or will have been, produced to Defendant in this lawsuit. Plaintiff otherwise denies Paragraph no. 14;

15. Plaintiff denies Paragraph no. 15, and specifically denies that any whited-out documents produced in this litigation, which whiting out obliterated the identities of any person, constitute or constituted any "confidential patient files";

16. Plaintiff denies Paragraph no. 17 based upon lack of information, and alternatively based upon the fact that Paragraph no. 17 assumes that Plaintiff had not, and did not, return all files to TCC, and that somehow Plaintiff's conduct constituted "a fraud" upon Defendant;

17. Plaintiff denies Paragraph no. 17 based upon lack of information, and alternatively upon the ground that Paragraph no. 17 calls for a legal conclusion on Plaintiff's part;

18. Plaintiff denies Paragraph no. 18;

19. Plaintiff denies Paragraph no. 19;

Wherefore Plaintiff prays that Defendant take nothing by way of Defendant's alternative counterclaims; that Defendant's counterclaims be dismissed or denied; and that Plaintiff be awarded either reasonable attorney's fees, or actual attorney's fees, for having to defend

against Defendant's ill-founded counterclaims brought in bad faith against Plaintiff.

DATED at Fairbanks, Alaska this 13 day of August, 1996.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James M. Hackett
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was hand delivered via Due Process courier service on Michael Walleri, Tanana Chiefs Conference Legal Department, this 13 day of August, 1996.

/s/ Jessica J. Koloski
Jessica J. Koloski

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-3626

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE,
Defendant.

Case No. 4FA-95-2745 Civil

ORDER

(Filed Dec. 17, 1996)

The court being fully advised upon the premises, and upon the stipulation of the parties,

IT IS HEREBY ORDERED that the *CIVIL PRETRIAL ORDER* dates are modified and extended as follows:

Event	Extension date
Expert Witness' Reports	12/15/96
Dispositive Motions (as to third party defendants)	12/16/96
Additional Witnesses (as to third-Party defendants)	1/3/97

Close of Discovery	2/21/97
Settlement Conference	2/1/97
Pretrial Memoranda	3/7/97
Exhibits	3/10/97
Objections to Depositions	3/7/97
Pretrial Conference	3/13/97 @ 2:45 p.m.
Trial	week of 3/24/97

ENTERED at Fairbanks, Alaska this 16 day of ~~November~~ December, 1996.

/s/ Jay Hodges
Honorable Jay Hodges
Superior Court Judge

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK, Plaintiff, vs. DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC., et. al Defendants.	)	Case No. 4 FA-95-2745 CI

TRIAL BRIEF

(Filed Mar. 13, 1997)

COMES NOW, the Defendants Tanana Chiefs Conference, Inc., Will Mayo and Kathryn Strle to submit the following trial brief.

I. SUMMARY OF CASE

This case involves a wage claim brought against TCC by Catherine Ipalook for overtime pay during here employment as the Patient Hostel Manager for a period of approximately 14 months, between June 13, 1994 and August 19, 1995. TCC has denied liability claiming that Ms. Ipalook was an employee exempt from overtime requirements. Additionally, TCC has counterclaimed against Ms. Ipalook for an amount equal to any liability which TCC may have incurred in this matter, claiming

that Ms. Ipalook breached her fiduciary duty as a past officer of the corporation in maintaining the Manager position as an non-exempt position. In turn, Ms. Ipalook has counterclaimed against Mr. Mayo and Ms. Strle claiming that they contributed to the liability of the Corporation as current officer and employee of the Corporation.

II. OUTSTANDING MOTIONS.

The Third Party Defendants have filed two motions for dismissal (failure to state a claim & standing) and one motion for summary judgement. The Court has not ruled on this motions.

I. STATEMENT OF FACTS OF CASE

Catherine Ipalook was employed by TCC as the Patient Hostel Manager for a period of approximately 14 months, between June 13, 1994 and August 19, 1995.[1] The Patient Hostel provides lodging for patients traveling into Fairbanks from outlying villages for medical care at CAIHC and FMH. The hostel consists of 8 units used for

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[1] TCC is a consortium of 26 member tribes of Interior Alaska which contract for the provision of services to the Native people located in Interior Alaska from the Indian Health Service under the terms of the Indian Self-Determination Act. Pursuant to these contracts, TCC operates Chief Andrew Isaac Health Clinic (CAIHC), which provides direct out patient medical care to Alaska Native residents of the Interior. Additionally, TCC operates a medical contract care program to provide hospital care through Fairbanks Memorial Hospital (FMH)to the Interior IHS service unit population.

patient quarters and an apartment. The hostel is staffed by a Patient Hostel Manager, a weekend relief manager, a house keeper, and a relief housekeeper. Additionally, there are two facility management personnel that provide building maintenance services for all TCC buildings in Fairbanks, including the Hostel. CAIHC also maintains a Community Health Representative, which provides patient liaison services between the hostel and CAIHC.

The patient hostel manager works at the hostel during the day. Her primary duty is to manage the facility and supervise 2 positions plus CHR duties.[2] This meant supervising four persons: Agnes Ostlund, the weekend/relief manager, and housekeepers, Stella Hamilton, Robin Hebert, and Clara Clark. Additionally, the Manager is on call 24 hours a day between 5:00 PM Sunday and 5:00 PM Friday. The Manager is provided an apartment on the premises, as her principal residence. During the normal workweek, a housekeeper maintains a daily 6 hour shift between 9:00 am-12 (noon) and 1-3 am. During the week-end (5:00 PM Friday to 5:00 PM Sunday) a relief manager is on duty. During the week-end, housekeeping services are performed by the relief manager when necessary. Since the opening of the hostel, the manager has been treated as an salaried employee, exempt from overtime. While in this position, Ms. Ipalook was paid a salary of $1916.65 a month, plus housing.

Ms. Ipalook had previously served as the President of TCC. During Ms. Ipalook's tenure as President, TCC operated the Patient Hostel. As President of TCC, Ms.

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[2] "CHR" refers to community health representive.

Ipalook had apparently neglected to review the position in question to reclassify the position in a manner consistent with her apparent belief that the position was non-exempt for overtime purposes.

After the first months of her employment as the Patient Hostel Manager, problems began between Ms. Ipalook and her supervisor, Ms. Bessie Williams. These problems resulted in extended an grievance over the course of the following four months. A primary issue in the grievance was Ms. Ipalook's complaint that she was not accorded proper status as supervisor over the patient hostel. Ms. Ipalook won her grievance, which confirmed her status as the supervisor of the Hostel. However, TCC refused to change her supervisor, and Ms. Ipalook resigned so that she could be "in a better position to address the problems experienced on this job from my immediate supervisor as a non-employee." This suit followed.

II. CONTESTED ISSUES OF FACT

A. WAGE CLAIMS AGAINST TCC

1) *Was Ms. Ipalook an exempt employee under the terms of 8 AAC 15.910 (a supervisory employee)?* Specifically, was Ms. Ipalook

a) employed solely for the purpose of regularly assigning and directing the activities of other employees'?

b) responsible for results of the work performed by the employees supervised?

c) employed for purposes other than as stated in (a) and (b) above for periods of time exceeding 20 percent of the hours worked in the workweek?

2) *In the alternative, was Ms. Ipalook an exempt employee under the terms of 8 AAC 15.910 (executive)?* Specifically,

a) was the Patient Hostel a recognized branch, department or subdivision of TCC?

b) was Ms. Ipalook's primary duty the management of the Patient Hostel?

c) did Ms. Ipalook's customarily and regularly directs the work of two or more other employees?

d) while employed as the Patient Hostel Manager, did Ms. Ipalook have the authority to hire or fire or effect any other change in status of other employees or where her suggestions or recommendations regarding these kinds of changes given particular weight?

e) did Ms. Ipalook customarily and regularly exercise discretionary authority?

f) did Ms. Ipalook earn at least two and one half (2 1/2) the state minimum wage at the time?

g) if no to item (f) above, did Ms. Ipalook devote more than 8 hours [20%] of employment each week to activities that are not directly and closely related to the administrative, executive, or professional work?

h) if yes to item (f) above, did Ms. Ipalook devote more than 16 hours [40%][3] of employment each week to activities that are not directly and closely related to the administrative, executive or professional work?[4]

f) was Ms. Ipalook compensated on a salary basis?

B. COUNTER CLAIM AGAINST IPALOOK

(1) Did Ms. Ipalook, during her tenure as President of TCC, exercise reasonable care in supervision of the TCC personnel system to assure compliance with wage and hour laws respecting classification of the Patient Hostel Manager position for overtime purposes? Specifically, did Ms. Ipalook

a) know or otherwise make reasonable inquiry into the status of the Patient Hostel Manager position for overtime purposes?

b) if yes to (a) above, did she take reasonable steps to properly evaluate and classify the Patient Hostel Manager position for overtime purposes?

2) Did Ms. Ipalook, during her tenure as Patient Hostel manager, inform TCC of possible liability arising

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[3] Alterntively, this percentage would be 20% in the event that it is found that Ms. Ipalook was paid less than 2 1/2 times minimum wages.

[4] Definitions of administrative and professional employees are set out in 8 AAC 15.910(1) and (11)

from possible misclassification of the Patient Hostel Manager during her tenure as President of TCC for overtime purposes? Specifically,

a) did Ms. Ipalook believe or have reason to believe that the Patient Hostel Manager position was exempt for overtime purposes subsequent to her tenure as President?

b) if yes, did she have such knowledge prior to TCC incurring the liability in question?

c) if yes, did she advise TCC in a timely manner to avoid such liability?

3) If yes, to either item (1) or (2) above, did TCC sustain any damages which were directly caused by Ms. Ipalook's above described actions or the failure to act?

C. THIRD PARTY CLAIMS AGAINST MAYO & STRLE.[5]

(1) Did Mr. Mayo and Ms. Strle during their respective tenure as President and Personnel Director of TCC, exercise reasonable care in supervision of the TCC personnel system to assure compliance with wage and hour laws respecting classification of the Patient Hostel Manager position for overtime purposes? Specifically, did they

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[5] Whether these issues remain in dispute is dependant upon dispostion of Defendants' outstanding motions for dismissal and summary judgement of the third party claims [against] Strle and Mayo.

a) know or otherwise make reasonable inquiry into the status of the Patient Hostel Manager position for overtime purposes?

b) if yes to (a) above, did they take reasonable steps to properly evaluate and classify the Patient Hostel Manager position for overtime purposes?

3) If yes, to item (1) above, did TCC sustain any damages which were directly caused by their above described actions or the failure to act?

II. CONTESTED ISSUES OF LAW AND LEGAL ANALYSIS OF CONTESTED ISSUES OF LAW AND EVIDENCE.

A. WAGE CLAIMS AGAINST TCC

1) The Fact That Ms. Ipalook Occasionally Performed Non-Executive/Non-Administrative Functions Does Not Mean That She Was Not An Exempt Employee. Wage and hour regulations provide that an executive employee is an employee,

A) whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized branch, department, or subdivision of the enterprise'
B) who customarily and regularly directs the work of two or more other employees;
C) who has the authority to hire or fire or effect any other change in status of other employees or whose suggestions or recommendations regarding these kinds of changes are given particular weight;
D) who customarily and regularly exercises discretionary authority

> E) who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who earns at least two and one half times the state minimum wage per hour for the first 40 hours of employment each week and who does not devote more than 40 percent of the employees weekly hours to activities that are not directly and closely related to the work described in this paragraph or paragraphs (1) or (11) of this section; and
> F) who is compensated on a salary basis;

8 AAC 15.910 (A)(7). It is reasonable to note that Ms. Ipalook performed some work which was non-executive or nonadministrative[6] in character. Subparagraph (E) of

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[6] The regulations define administrative employee as an employee

> A) whose primary duty consists of work directly related to management policies or supervising the general business operatons of his employer
> B) who customarily and regularly excercises discretion and independent judgement;
> C) who permorms his work under only general supervision;
> D) who is paid on a salary or fee basis;
> E) who regularly and directly assists a proprietor or an exempt executive employee of the empoloyer; and
> F) who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who earns at least two and one half times the state minimum wage per hour for the first 40 hours of employment each week and who does not devote more than 40 percent of the employees weekly hours to activities that are not directly and closely related to the work described in this paragraph or paragraphs (7) or (11) of this section.

8 AAC 15.910(A)(1)

the above paragraph establishes a so called "40 %" rule[7], which limits the amount of time a non-exempt employee may perform such duties. This rule has three important points relevant to this case.

First, the type of work which is excluded from the percentage calculation, includes all work defined in paragraphs (1) (7), and (11) which includes administrative, executive and professional work. Of particular note, some of Ms. Ipalook's duties should be considered administrative in nature, and as such, should be classified as exempt activities for the purposes of the percentage rule.

Second, the regulation makes it clear that such exempt work may be "directly or *closely* related" to executive, administrative and professional type work. Non-exempt work under the percentage rule, includes work which is strictly executive, administrative and professional type work and closely related activities. In other words, in applying the percentage test, the Court can only consider non-exempt work which is unrelated to the executive, administrative and professional duties of the position.

Third, the Court should only consider non-exempt work that is done "each week"; that is to say, the Court should consider the type of work that was within the positions regular duties *each* week. The court should not consider non-exempt work which was only sporadically or occasionally performed.

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[7] The 40% rule applies to cases where the employee's compenstion is 2 1/2 times minimum wage. In cases of a lower compensation, a 20% rule applies.

B. COUNTER CLAIM AGAINST IPALOOK

1) Whether Ms. Ipalook was a "Figurehead" Officer, Is Irrelevant. In her depositions, Ms. Ipalook explains her breach of duty of care by suggesting that she was a mere figurehead. The law does not recognize a defense that an officer or director was a figurehead as an excuse for violation of a fiduciary duty. *Golden Rod Mining Co. v Bukvich*, 92 P.2d 316, 319-320 (Mont. 1939).

An officer may, under some circumstances, rely upon others, however, the officer has a duty to become familiar with the opinion, report, or other source of advice relied upon. See 19 C.J.S. Corporations §480.

2) Termination of Position As President, Do Not Completely Terminate Fiduciary Obligations. Generally, the fiduciary obligation terminates when an officer ceases to be an officer of a corporation. However, if the inception of a transaction relates back to the actions and conduct of the officer while in office, the fiduciary duty of the officer also relates back. 3 FLETCHER, CYCLOPEDIA CORPORATIONS §860, at 276; *Comedy Cottage, Inc. v Berk*, 495 N.E. 2d 1006, 1011 (Ill. App. 1986).

3) Failure To Plead An Affirmative Defense Barrs Presentation Of The Defense At Trial. In the Court's bench ruling respecting denial of summary judgment, the Court indicated that Ms. Ipalook may present evidence respecting intervening acts of the current officers of TCC which may have relieved Ipalook of any fiduciary duty. Such a defense of intervening acts would amount to an affirmative defense governed by Civ. R. 8, which requires that such defenses be pled in answer to the complaint. Ms. Ipalook did not [plead] such an answer, and therefore

waived any such defense. *Merrill v Faltin*, 430 P.2d 913 (Alaska, 1967).

C. THIRD PARTY CLAIMS AGAINST MAYO & STRLE.

1) Impossibility Of Contribution For Actions Arising When Ipalook Was President. If Ipalook is found liable for breach of fiduciary duties while President, she may only look for contribution to officers who were in office at the time. There is no dispute that Mr. Mayo was not an officer of the TCC and Ms. Strle was not employed at TCC at the time Ms. Ipalook was President. Therefore, any contribution must arise on actions or omissions which occurred subsequent to Mr. Mayo's appointment as President, and Ms. Strle's employment.

2) An Employee Generally Does Not Owe A Fiduciary Duty To The Corporation. Much of Ipalook's claim against Ms. Strle rests upon the presumption that Ms. Strle breached a fiduciary duty owed to TCC. While this matter is pending a motion to dismiss, it must be noted again, that a mere employee does not owe a fiduciary duty to a corporation to the same degree as an officer. *Southeast Consultants, Inc. v McCrary Eng. Corp.*, 273 S.E.2d 112, 115-116 (Ga., 1980).

Respectfully submitted this 13th day of March, 1997

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Defendants
Third Party Defendants.

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,

Plaintiff,

vs.

DENÁ NENÁ HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.

Defendant.

Case No. 4FA-95-2745 Civil

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* * *

[p. 524] employee. You would exclude the work that she was required to do, based upon her responsibility for the work – for supervising the work of the other employees. Consequently, we believe that she falls within the definition of both a supervisory and an executive employee.

Before I move on to that, I would like to address one other issue, and that is the issue of – related to the wage claim, and that is the liquidated damages. I realize that Your Honor has ruled that subsection D of 23.10.110 does

not apply in this case, because it became effective in 1995. However, I would like to point out to the court's attention a case that has been cited in this case a number of times, and that's *Bobich versus Stewart*, 843 P.2d 1232, Alaska 1992, which discussed liquidated – the nature of liquidated damages. In discussing that, the court held that prejudgment interest could not be applied to liquidated damages. What is important and relevant to this discussion, Your Honor, is why. The court held that because the plaintiff had no right to liquidated damages, prior to the entry of judgement on the underlying wage claim for overtime, that the prejudgment interest would not apply.

Under the *Bobich* case, therefore, Your Honor, the right to the liquidated damages does not arise until entry of a judgment on the underlying wage claim. In other words, Ms. Ipalook had no right to liquidated damages prior to the [p. 525] entry of judgment of this court, including her – during the period that she was employed in 1994 and 1995. The statute became effective August 22nd, 1995. This is after that date. And that her right to liquidated damages only arises at this time when the statute is effective. And we would argue that it – that the statute – the – it's a kind of a reverse relation back argument, Your Honor, in that we're arguing that the prior law would not apply because it has been amended, and the right arises now, not then.

THE COURT: So if it went the other way,. . . .

MR. WALLERI: Pardon me?

THE COURT: So in other words, if the statute wasn't in effect at the time of her employment, but later on it was amended, then she'd be entitled to liquidated

damages, right? It's the reverse. What you're saying is, the liquidated damages only attaches at the time of judgment, right?

MR. WALLERI: Right.

THE COURT: So if there was no statute for liquidated damages in effect at the time of employment,. . . .

MR. WALLERI: Correct.

THE COURT: . . . . but after the employment they amended it to include liquidated damages, you'd be entitled to liquidated damages.

MR. WALLERI: Absolutely right. Because of the nature of the damages is punitive. In other words, it is not to [p. 526] compensate the employee, it is to send a message in the future. And that – and the court has indicated that's a policy issue. And it would serve – it would not serve that purpose to have mandatory liquidated damages in a case when that was not the policy of the state.

THE COURT: Okay. Hang on a second.

MR. WALLERI: Go ahead.

THE COURT: At the time this was argued, my recollection is that you weren't the attorney that argued it,. . . .

MR. WALLERI: Right, right.

THE COURT: . . . . and the other attorney didn't concede it.

MR. WALLERI: Right, he did not.

THE COURT: Okay. So now – I mean, I don't have a problem with you raising this, but it's going to have to be – I mean, I'll certainly permit you to raise that by way of reconsideration, but it'll have to be brief, and give Mr. Hackett an opportunity to brief that issue.

MR. WALLERI: I appreciate that, Your Honor.

THE COURT: Okay.

MR. WALLERI: Now, turning to the counterclaims against Ms. Ipalook and TCC, did Ms. Ipalook, during her tenure as president of TCC, exercise reasonable care and supervision of the TCC personnel system to assure compliance with wage and hour laws, respecting classification of patient hostel manager

* * *

[p. 530] situation, he was addressing the situation, and he made a reasonable assessment. In the case of Ms. Ipalook, she didn't even attempt to address those issues at all, in any way with regards to the corporation, by her own testimony. Strikingly different behaviors for the purposes of a corporate liability claim. And so we believe that while Mr. Mayo discharged his duty, his fiduciary duties, that Ms. Ipolook did not.

Therefore, Your Honor, we would request that judgment – either a judgment on the original wage claim be entered in favor of Tanana Chiefs Conference, or in the alternative, that if judgment on the original wage claim is entered, that no liquidated damages be attached, and that we receive an offset in an equal amount against Ms. Ipalook for her violation of fiduciary duties.

THE COURT: Okay. With respect to the liquidated damages issue, the court will permit you to, you know, file a motion to reconsider, and submit briefing on that issue, depending on what the outcome of the case is, since that's an issue that was not – was conceded by prior counsel, or the other counsel, that it – the new statute wasn't in effect.

MR. WALLERI: My understanding is that he actually argued against that, Your Honor.

THE COURT: No, they conceded – Mr. Hackett pointed out that the statute was amended afterwards, then it was agreed that the statute – the amendment didn't apply.

[p. 531] MR. WALLERI: Oh, I apologize, Your Honor.

THE COURT: That's my understanding. But. . . .

MR. WALLERI: I was of a different. . . .

THE COURT: . . . . based on what you've raised today, which may or may not be viable, it's a different issue that was addressed previously that I would permit you to file, you know, a reconsideration of that specific issue, and give Mr. Hackett an opportunity to respond. Okay?

MR. WALLERI: Thank you, Your Honor. That concludes my closing remarks.

THE COURT: Mr. Hackett, any rebuttal?

MR. WALLERI: Yeah, very briefly, Your Honor. I just want to highlight a couple points that Mr. Walleri,

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IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH,
a/k/a TANANA CHIEFS
CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

MOTION TO RECONSIDER APPLICATION OF MANDATORY LIQUIDATED DAMAGES.

(Filed Apr. 28, 1997)

COMES NOW, Tanana Chiefs Conference, Inc., defendant in the above captioned matter, to request reconsider of the application of mandatory liquidated damages in the judgment rendered by the Court, for the reasons more fully set out in the accompanying memorandum.

Respectfully submitted this 28th day of April, 1997

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Plaintiff

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH,
a/k/a TANANA CHIEFS
CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER APPLICATION OF MANDATORY LIQUIDATED DAMAGES.

(Filed Apr. 28, 1997)

The Court has found that Ms. Ipalook was a non-exempt employee for the purposes of the payment of overtime during her tenure as the Patient Hostel Manager for TCC. The Court awarded Ms. Ipalook $77,412.02 in compensatory damages for unpaid overtime, and an equal amount as statutory liquidated damages. TCC requests the court to reconsider its ruling awarding liquidated damages to Ms. Ipalook in the above action. In its decision, the Court held that TCC had proven that the failure to pay Ms. Ipalook overtime was made in good faith, and that the defendant had reasonable grounds for classifying the Patient Hostel Manager position as an exempt position for the purposes of overtime.

I. STATEMENT OF ISSUE: DOES THE COURT HAVE DISCRETION IN AWARDING LIQUIDATED DAMAGES.

The Alaska Wage and Hour Act, [AWHA] authorizes a Court to award liquidated damages in an amount equal to the amount of unpaid overtime recovered by a plaintiff. *See* A.S. 23.10.110(a) Prior to 1995, the law in Alaska was that liquidated damages were mandatory. *Alaska Int'l Industries, Inc. v Musarra,* 602 P.2d 1240 (Alaska 1979); *McKeown v Kinney Shoe Corp.,* 820 P.2d 1068 (Alaska, 1991). In short, the Court lacked discretion to deny liquidated damages.

In 1995, the Legislature enacted statutory amendments which added subsections (d)-(j) now appearing in the statute. The amendments now provide Courts with the discretion with regard to the award liquidated damages in cases where the "act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060." id.

This development of AWHA on this issue mirrors the development of the federal Fair Labor Standards Act, [FSLA] which is discussed by the Court in the *Musarra,* 602 P.2d, at 1248-1249. Essentially, the original FLSA also required mandatory liquidated damages. id. In 1947, Congress amended the FLSA to allow Courts discretion in awarding liquidated damages in cases of employer" good faith" in not paying overtime. The 1995 amendments to the AWHA reflect a similat policy change in Alaskan State law. The question before the Court is whether the Court has discretion to award liquidated

damages as allowed under the 1995 amendments or whether the Court is mandated to award liquidated damages as provided in Alaska law prior to the amendments.

II. ARGUMENT

A) Introduction

Ms. Ipalook worked as the Patient Hostel Manager from June 19, 1994 to August 18, 1995. The statute in question provides that "Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act." Sec. 4, ch 37, SLA 1995 This section would appear to apply to subsections added by the bill. The bill's effective date was August 22, 1995, and it is upon this basis that Ipalook argues that mandatory liquidated damages applies.

The FSLA and the AWHA differ in a number of respects. Most notably, the policies behind the FSLA and the AWHA provisions relating to liquidated damages are substantially different. Under the FSLA, liquidated damages are considered to be a recovery "as compensation for delay in payment of sums due under the Act." *Brooklyn Savings Bank v O'Neil*, 89 L.Ed. 1296, 1324 (1945) In other words, liquidated damages are compensation for damages suffered by a worker which are too obscure and difficult to prove. id. This includes damages attributable to lost interest, which would normally be addressed through the award of pre-judgment interest under the Alaskan system. To avoid double compensation under the FSLA, pre-judgment interest is not allowable for an award of actual damages for the failure to pay overtime under the FSLA. id. Consequently, the federal courts have

held that award of liquidated damages is not punitive. *Overnight Motor Transp. Co. v Missel*, 86 L.Ed. 1682, 1690-1691 (1942).

Alaskan law notably differs on this point. Liquidated damages under the AWHA *are* punitive, and are intended as a deterrence for employers to assure payment of overtime to employees. *Alaska Int'l Industries, Inc. v Musarra*, 602 P.2d 1240 (Alaska 1979); *McKeown v Kinney Shoe Corp.*, 820 P.2d 1068 (Alaska, 1991). In Alaska, pre-judgment interest is paid on an award of actual compensatory damages of the unpaid overtime. *Bobich v Stewart*, 843 P.2d 1232, 1237 (Alaska, 1992). On the other hand, the same Court held

> We have held that under the AWHA, liquidated damages are a form of punitive damages, not a substitute for compensatory damages. *Gore v Schlumberger Ltd.*, 703 P.2d 1165, 1166 (Alaska, 1985). Because a plaintiff has no right to use liquidated damages before they are actually awarded, an award of prejudgement interest would compensate her for a nonexistent loss. Therefore, we hold as a matter of public policy that under the AWHA, an employee may not recover prejudgement interest for liquidated damages.

id, at 1236-1237. The thrust of the *Bobich* case is two fold. First, the right to liquidated damages does not arise prior to the entry of judgment. Second, liquidated damages under AWHA are punitive and intended as a deterrent to employers. Consequently, in awarding liquidated damages, the Court must consider these factors.

B) The Statutory Savings Clause Only Relates To Vested Rights, Which Does Not Include The Right To Liquidated Damages.

With regard to the first consideration, the right to compensatory damages (unpaid overtime) relate to "wages earned for hours worked on or after the effective date" of the 1995 amendments. Clearly the right to these damages arose under operation of the pre-'95 statute. However, as noted above, the right to liquidated damages does not arise prior to the entry of judgment against the employer. *Bobich v Stewart*, supra. Clearly, Ms. Ipalook's right to liquidated damages did not arise prior to the entry of judgment in this case, which is well after the 1995 amendments to the AWHA.

At best, Sec. 4, ch 37, SLA 1995, which provides that "Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act," is a saving clause. In *Bidwell v Scheele*, 355 P.2d 584 (Alaska, 1960) the Court discussed the effect of such a saving clause on vested and unvested rights. As a general matter, repeal of a statute cannot extinguish a vested right. *id, explained at State v Kaatz*, 572 P.2d 779 (Alaska, 1977). However, where the rights in question do not vest prior to the effective date of the statutory amendments, the amendments should apply. *Bidwell v Scheele*, 355 P.2d, at 587; *State v Kaatz*, 572 P.2d, at 779.

In this case, the rights to compensatory damages vested prior to '95 amendments, and would be governed by the statute in effect then. The right to liquidated damages, however, vested at the time of entry of the

judgment – after the '95 amendments, – and would be governed under current law.

C. State Constitutional Concerns.

Such a holding is consistent with State Constitutional concerns raised by the change in the statute. Alaska Equal Protection analysis uses a single test rational basis test in reviewing State law. *Isakson v Rickey*, 550 P.2d 1 (Alaska, 1978). The test is a sliding scale which provides greater scrutiny of a statute as it may apply to fundamental rights or suspect classifications. id. However, the root concern is that a legislative action must bear a fair and substantial relation to a legitimate governmental purpose. *Commercial Fisheries Entry Comm'n v Apokedak*, 606 P.2d 1255 (Alaska, 1980).

In construing the AWHA, the Court must consider the punitive and deterrent policy goals of the liquidated damage provisions of the AWHA. In particular, the Court must consider if the mandatory application of liquidated damages to a good faith employer bears a fair and rational relationship to the legislative objective to deter willful non-payment of overtime. In this case, it clearly does not.

By its very definition, punitive awards seek to accomplish prospective goals – i.e. in this case, the deterrence of non-payment of overtime by an employer. When the state policy provided for mandatory liability for punitive damages, the legislative goal was to put all employers on notice, and coerce employers to pay overtime even, if they had a good faith believe that the employee was exempt from the payment of overtime. While this was the state legislative policy, mandatory

liquidated damages bore a fair and rational relationship to this policy.

However, there is no rational nexus between the imposition of mandatory liquidated damages to a good faith employer, when the state policy has changed. In fact, retroactive application of such mandatory damages to a good faith employer would be contrary to current state policy, which is to recognize a good faith exemption to such liquidated damages. There is no deterrent value in the prospective application of a discarded policy. Rather, such application merely gives life to the otherwise dead hand of an outmoded policy, which bears no rational relation to the legislative objectives intended by the legislature. It is clear that the Alaska legislature intended to deter the willful failure to pay overtime, rather than to punish an employer whose omissions were premised upon good faith. The application of liquidated damages to a "good faith" employer does not further the underlying policy goals of the AWHA as amended. The retroactive application of the pre-1995 statute fails to rationally relate to the purpose of AWHA as it existed prior to 1995 or in its current form.

In short, the change in policy of the AWHA severs the nexus between prospective deterrence and the legislative objective contained in the statute. Under such circumstances, the application of this policy becomes totally unrelated to the proscriptive purposes of liquidated damages to deter future employers from *willfully* failing to pay overtime, rather than the retrospective impacts of applying the pre-1995 law. Thus the change in policy renders the retroactive application of liquidated damages

constitutionally suspect under Alaskan Equal Protection analysis.

D. Recent U.S. Supreme Court Cases On Punitive Damages.

Recently, a series of decisions by the United States Supreme Court has addressed the issue of punitive damages relative to substantive and procedural due process/equal protection concerns. ~~The U.S.~~ Supreme Court has recently addressed substantive due process/equal protection concerns respecting punitive awards in several cases. The Court noted in *Pacific Mut. Life Ins. Co. v Haslip*, 113 L.Ed. 2d 1 (1991), that punitive award of a judgment may be unconstitutional excessive, but had failed to articulate a standard of constitutional review. In *TXO Production v Alliance Resources*, 125 L.Ed. 2d 366 (1993) the Court split offering several opinions with regard to substantive and procedural due process and equal protection review of the punitive damage awards. Generally, however, the opinions rejected a strict nexus between the size of compensatory and punitive damages. Of particular note was the concurring opinion of Justice Kennedy, who suggested that the focus of inquiry should not be on the size of the award, but rather the reasons for it. He stated,

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards. . . . Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational

> concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.

125 L.Ed. 2d, at 385 In short, the opinions in *TXO* address the substantive due process/equal protection concerns which, at a minimum, demand a nexus between the goal of deterrence and retribution and the award of punitive damages. In the case of the AWHA, the constitutional principal would suggest that there must be a nexus between the deterrence goal and the application of the punitive damages. But given the Court's finding that TCC was a good faith employer respecting the classification of Ms. Ipalook, the nexus between deterrence and the punitive damages seems highly suspect.

In *Honda Motor Co. [v.] Oberg*, 129 L.Ed. 2d 336 (1994) the Court addressed procedural due process concerns of punitive damage awards. In that case, the Court held that Oregon's failure to provide judicial review of an award of punitive damages was violative of the Fourteenth Amendment and Due Process Clause of the U.S. Constitution. The Court employed an analysis which compared procedures for punitive awards to traditional common law practice. In particular, the Court noted that punitive damages pose an acute danger of arbitrary deprivation of property. Traditionally, common law provided discretion with the courts to prevent arbitrary awards. id, at 349. And the Court held that judicial review, and *inter alia*, judicial discretion to review such awards was a means which common law traditionally has employed to prevent such arbitrary awards. A State legal system which deviates from judicial review of such awards, or which

severely limits meaningful judicial review in derogation of the traditional common law, is suspect.

Applying the procedural due process/equal protection analysis of *Honda*, to the Alaska AWHA, it can only be considered that the lack of judicial review and discretion raises constitutional concerns. The 1995 amendments properly apply the *Honda* principals to assure due process are addressed.

In summary, the application of mandatory liquidated damages which existed in the '95 statute, may be now be Constitutionally suspect under recent procedural and substantive due process analysis of U.S. Supreme Court.

CONCLUSION

The Court should deny the imposition of mandatory liquidated damages in this case because, the saving clause contained in the '95 amendments does not apply to unvested rights such as the liquidated damages, and that imposition of mandatory liquidated damages in this situation is constitutionally suspect under both the state and federal constitutions.

Respectfully submitted this 28th day of April, 1997

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Plaintiff

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
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IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENÁ NENÁ HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4FA-95-2745 Civil

PLAINTIFF'S MOTION TO STRIKE PORTION OF DEFENDANT TCC'S MOTION FOR RECONSIDERATION

(Filed April 30, 1997)

COMES NOW Plaintiff, by and through counsel, and pursuant to Civil Rules 8(c), 16(f), 37(b)(2), 77(1)(2), and 95(a), moves the court to strike Sections II.C. and D. of Defendant TCC's memorandum of law in support of Defendant TCC's motion for reconsideration; and to award Ipalook reasonable costs.

This motion is supported by a review of the pleadings of record, and by the accompanying memorandum of law.

DATED at Fairbanks, Alaska this 30 day of April, 1997.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James M. Hackett
Attorney For Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30 day of April, 1997, a true and correct copy of the foregoing document was *Hand delivered* by Due Process courier service on

Mr. Michael Walleri
Legal Department
Tanana Chiefs Conference, Inc.
122 First Avenue, Suite 600
Fairbanks, AK 99701
LAW OFFICES OF JAMES M. HACKETT, INC.

/s/ J. Koloski
Jessica J. Koloski

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IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENÁ NENÁ HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4FA-95-2745 Civil

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE PORTION OF DEFENDANT TCC'S MOTION FOR RECONSIDERATION

(Filed April 30, 1997)

Motions for reconsideration are addressed under Civil Rule 77(k) and (l). Civil Rule 77(l)(2) provides as follows:

> (2) The motion for reconsideration shall specifically state which of the grounds for reconsideration specified in the prior subparagraph exists, and shall specifically designate that portion of the ruling, the memorandum, or the

> record, or that particular authority, which the movant wishes the court to consider. The motion for reconsideration and supporting memorandum shall not exceed five pages.

Here Defendant TCC's memorandum of law is itself eleven (11) pages long. Section II.C. and D., or pages 6-11, should be stricken. The mere fact of Defendant TCC's overlength filing, which violates the plain, clear terms of Civil Rule 77(1)(2), justifies the court's striking this portion of pleading *sua sponte*.

Further, at page 6 of its memorandum, Defendant TCC attempts to raise constitutional arguments which were never previously raised in Defendant TCC's pleadings, nor at trial. As such, such arguments must be deemed waived. See Civil Rules 8(c); 16(f); 37(b)(2)(B)(C).[1]

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[1] Civil Rule 8 provides in relevant part as follows:

> (c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.

Civil Rule 16 provides in relevant part as follows:

> (f) **Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

Civil Rule 37 provides in relevant part as follow:

> (b) **Failure to comply With Order.**
>
> (2). Sanctions By Court in Which Action is Pending . . . if a party fails to obey an order entered under Rule 16(e) of 26(b), the court in which the

Civil Rule 95(a) provides as follows:

Rule 95. Penalties.

(a) For any infraction of these rules, the court may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

CONCLUSION

The court should order Sections II.C. and D. in Defendant TCC's memorandum of law stricken; and should award Ipalook reasonable costs under Civil Rule 95(a).

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action is pending may make such orders in regard to the failure as are just, and among others the following:

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

DATED at Fairbanks, Alaska this 30 day of April, 1997.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James H. Hackett
Attorney For Plaintiff

* * *

[p. 551] THE COURT: The court makes the following ruling relative to the request for reconsideration. The court denies the motion to reconsider for the following reasons: Number one, during the course of our pretrial discovery, during the pretrial proceedings, it was agreed by, not Mr. Walleri, but other counsel for Tanana Chiefs was present, that when the issue was raised concerning liquidated damages, that the amendment did not apply.

Irrespective of what the court did or didn't do relative to any order concerning the withdrawal of any affirmative defenses, there were no affirmative defenses raised concerning this issue until during the course of the trial. Any motion to reconsider is untimely, based on any ruling concerning the affirmative defenses that occurred during the pretrial.

The issue concerning – this trial was tried, it was tried on the issue that the amendment did not apply, and the court does not feel it's appropriate, under the facts of this case, to grant a new trial for the limited issue of that. In any event, since it was conceded that the amendment did not apply. Furthermore, based on the *Grimes* case, the court would find that the amendment does not apply even if they're not in the concession.

The court does not find there are any constitutional issues to be addressed in any of those issues that were raised, or waived, during the course of the pretrial [p. 552] proceeding. Therefore, the court finds it does

not have any discretion, and liquidated damages are appropriate, as the court previously ruled.

* * *

[p. 546] mentioned by the TCC. I guess they have no response to it. But that's AS 01.10.100(a), and we quoted that for the court. And that says, quote, if the repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred, or right accruing or accrued under that law, unless the repealing or amending acts so provides expressly. These amendments don't do anything with the liquidated damages, they just say if the defendant – in other words, they don't wipe out liquidated damages. In fact, they actually establish a very high standard that the employer has to prove, not only good faith, as defined in the statute somewhat, and they also – the employer has to show reasonable grounds.

The employer never showed reasonable grounds in this case, and I'm not sure that the court's good faith ruling was anything more than general good faith. And I don't even know if the court was really applying the statutory good faith under the amendments.

THE COURT: That's true, Mr. Hackett. At the time that the court ruled, the issue concerning what had to be proved under the statute was not addressed by either party,. . . .

MR. HACKETT: Correct.

THE COURT: . . . . which is a clear and convincing standard.

MR. HACKETT: That's correct, Your Honor. And that –

* * *

[p. 562] November 21st, 1995.

Other than the situation concerning the objections to the findings for the first motion to amend the findings, everything else has been ruled on. And with respect to the original motion to amend findings, the – I mean, I don't think that's a major issue since, as the court indicated, that was a generic finding rather than a legal finding in terms of the good faith. I mean, I don't – as the court indicated, Tanana Chiefs was – I mean, it was good faith in the sense that they were not doing something intentional or willful; that it was not a legal finding of good faith pursuant to the statute, or the amended statute. So I don't know if that's a major issue or not.

What else do the parties need the court to resolve at this time?

MR. HACKETT: I guess the only other thing, Your Honor, would be, you know, we lodged – I guess one of the first things we lodged were proposed findings and conclusions, and. . . .

THE COURT: Well, there's some objections. Mr. Walleri filed some written objections for that.

MR. HACKETT: Right. And then so. . . .

THE COURT: And I don't know if you were going to reply or what.

MR. HACKETT: Well, under the Rule, I didn't have a – I

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[p. 561] this case, Tanana Chiefs was in fact the primary defendant in the case. The same counsel represented all three, or the defendant as well as the third-party defendants, which were joined pursuant to the claim against Ms. Ipalook, or the counterclaim against Ms. Ipalook.

It's clear that if there was in fact any type of conflict situation concerning the three, quote, defendants or third-party defendants, additional counsel should have been appointed to represent them. This is a situation where clearly the interest of all three was the same in practicality, and therefore it was – the court does not consider it was a joint offer. It is in fact a valid offer of judgment which is exceeded, and therefore the ten and a half – or the fifteen and a half percent prejudgment interest rate should apply.

The court finds further under the facts and circumstances of this case that, because of the dealings between the parties, the standing practice that had been utilized in terms of how this position was treated, that it would be unfair to Tanana Chiefs to have prejudgment interest accrue from the date of the work, rather the date of the filing of the lawsuit, which is the first notice that Tanana Chiefs had that there was a claim, should be utilized as the date the prejudgment interest should run from, which is November 21st, 1995. So prejudgment interest should run from

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Supreme Court, U.S.
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No. 99-308

In The

Supreme Court of the United States

DENÁ NENÁ HENASH a/k/a
TANANA CHIEFS CONFERENCE,

Petitioner,

vs.

CATHERINE N. IPALOOK and
The STATE OF ALASKA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1) The Reply Brief Contains A Misstatement of Fact; The Constitutional Issues Were Timely Raised

Ipalook's Opposition Brief incorrectly states that the federal due process question was not timely raised under State law. The representation is clearly in error. The issue was raised on a motion for reconsideration filed in a timely manner. Ipalook moved to strike the constitutional arguments in that motion. The trial court declined that request. Finally, the Alaska Supreme Court ruled on the merits of the issue.

As noted in the Petition, the Trial Court granted Tanana Chiefs leave to file a motion for reconsideration with respect to the issue of punitive/liquidated damages. Petition, at 6. Indeed, the Respondent's Appendix contains a transcript of the proceeding in which the Court stated:

> With respect to the liquidated damages issue, the court will permit you (Tanana Chiefs) to, you know, file a motion to reconsider, and submit briefing on that issue, . . .

Resp. App., at 49. Additionally, Respondent's Appendix also contains a copy of the motion for reconsideration, which relied upon the recent decisions of the U.S. Supreme Court on punitive damages. *See* Resp. App., at 58-60. In Alaska, reconsideration may be sought up to 10 days *after* the date of notice of a ruling. Civ. R. 77(k). In the present case, the motion to reconsider was filed on April 28, 1997 [App. 62; Resp. App. 50], which was *before* the entry of the trial Court's Findings of Facts, entered on June 24, 1997. Tanana Chiefs sought reconsideration after

the Court orally announced its intention to rule, but before entry of any ruling. Clearly, the issue was raised in a timely matter under Alaskan procedural rules.

Moreover, Ipalook sought to strike portions of the Tanana Chiefs' motion for reconsideration citing the same argument advanced in the Opposition filed in this Court. Resp. App. 63. The trial Court did not approve Ipalook's motion.

Finally, it must be noted that the Alaska Supreme Court ruled on the merits of the issues raised in the petition before this Court. The Alaska Supreme Court did not deny Tanana Chiefs' arguments on timeliness or waiver grounds. The Court ruled on the merits. Given this record, it is remarkable that Ipalook now claims that the issue was not timely raised. Clearly, Tanana Chiefs raised the issue in a timely manner, and Ipalook's Brief in Opposition seeks to misrepresent the record.

2) The Petition Raises Issues of National Importance.

Ipalook's Brief in Opposition argues that the issues raised in the Petition fail to raise issues of national importance. However, Ipalook notes that at least one other state – Montana – has a state overtime statute that has been interpreted to mandate punitive damages in the absence of employer's reprehensible conduct as in Alaska. *Rosebud County v. Roan*, 627 P.2d 1222, 1228 (Montana 1981).[1]

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[1] The other cases cited by Ipalook do not deal with overtime claims under state statue, and can be generally distinguished in that the cases contain evidence of

While Montana has not specifically ruled on whether liquidated damages under its statute are punitive, the indications are strong that Montana has a similar statute to Alaska. In Montana an employee may collect both "liquidated" damages and pre-judgement interest. *Id.* This would strongly suggest that the damages are punitive and not truly "liquidated".[2]

While it appears that no other State has adopted a similar interpretation of state law, at least five other States have overtime statutes that could be interpreted to mandate "liquidated" damages without regard to employer's reprehensible conduct.[3] It is unclear whether those States will follow the Alaska and Montana precedence. However, guidance from this Court would be helpful to those five States in construing their statutes in a constitutional manner, or considering the constitutional issues raised by their statutes. Thus, while not affecting a majority of States, the issues raised in this appeal affect at

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reprehensible conduct by the defendant. As noted in the Petition, many statutes in the country provide for mandatory punitive damages for conduct that is reprehensible *per se*. *See* Petition, at 12-13.

[2] Pre-judgement interest is not available where the statute provides for liquidated damages because liquidated damages are intended to compensate the worker for monetary injuries that are difficult to prove, such as lost interest. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 687, 745, 89 L.Ed. 1297, 1313, 65 S.Ct. 895 (1942). Where pre-judgement interest is available in addition to "liquidated" damages, the latter are considered to be punitive. *Bobich v. Stewart*, 843 P.2d 1232, 1236-1237 (Alaska 1992).

[3] These include Maine [26 MRSA Sec. 664 & 670]; Missouri [MRS 290.527]; Michigan [MCL 408.393]; New Mexico [NMSA 50-4-26]; and South Carolina [SCS 41-10-80].

least seven states, and any State which might consider similar legislation in the future.

Moreover, as both Tanana Chiefs and Ipalook note, the issue often arises in contexts other than overtime wage claims, such as landlord-tenant, consumer protection and similar legislation. Thus, while only seven state's overtime wage statutes are directly affected, the issue touches many states and presents an issue of national importance.

3) The Alaska Supreme Court's Reliance On *Overnight Motor Transp. Co. v. Missel* May Be Grounds For Summary Remand For Consideration In Light of *BMW v. Gore*.

The Opposition Brief correctly notes that the Alaska Supreme Court solely relied on *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 L.Ed. 1682 (1942). Implicit in that reliance, however, is the Alaska Court's failure to acknowledge differences between liquidated (non-punitive) damages under the FSLA considered in *Missel* and the punitive nature of such damages under Alaska law. More importantly, however, is the silence of the Alaska Court with respect to *BMW of North America v. Gore*, 516 U.S. 559, 116 S.Ct 1569, 134 L.Ed.2d 809 (1996). Despite briefing on the matter, the Alaska Court simply did not discuss whether *BMW of North America* was or was not applicable to awards under the Alaska statute.

In *Portec, Inc. v. The Post Office*, 499 U.S. 915, 113 L.Ed.2d 235, 111 S.Ct. 1299 (1991)[4] this Court granted a writ of certiorari, vacated and remanded to the Tenth Circuit for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 113 L.Ed2d 1, 111 S.Ct. 1032 (1991). The Tenth Circuit had not considered the *Haslip* case in reaching its decision.[5] A similar result may be appropriate here, where the Alaska Supreme Court simply failed to address the considerations articulated by this Court in *BMW of North America v. Gore*, 516 U.S. 559, 116 S.Ct. 1569, 134 L.Ed.2d 809 (1996).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 30, 1999

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[4] The case below is reported at *The Post Office v. Portec, Inc.*, 913 F.2d 802 (10th Cir., 1990).

[5] Unlike this case, the Tenth Circuit in *The Post Office v. Portec, supra*, decided the matter prior to the issuance of it decision in *Haslip*.